

# THE TOTALITARIAN IDEOLOGICAL ORIGINS OF HATE SPEECH REGULATION

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## I. INTRODUCTION

*Obviously, “political correctness” is a strategy of intimidation in the struggle for intellectual and educational power.<sup>1</sup>*

- Arthur Schlesinger, Jr., historian and special assistant to John F. Kennedy

*For many members of the former Marxist left, the death of Communism has been replaced equally fervidly with advocacy of the new PC.<sup>2</sup>*

- Ronald Radosh, historian and former Marxist

Despite the awful human toll of totalitarian communist regimes,<sup>3</sup> many contemporary liberals advocate the very speech controls characteristic of those regimes. As this Article will demonstrate, current efforts to regulate speech are reminiscent of the speech controls instituted within Soviet and Maoist regimes. This Article traces the ideological origins of hate speech regulation from totalitarian communist rule directly through to current speech regulation proposals.

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<sup>1</sup> Arthur Schlesinger, Jr., *Multiculturalism v. The Bill of Rights*, in OUR COUNTRY, OUR CULTURE: THE POLITICS OF POLITICAL CORRECTNESS 218, 225 (Edith Kurzweil & William Phillips eds., 1994).

<sup>2</sup> Ronald Radosh, *McCarthyism of the Left*, in OUR COUNTRY, OUR CULTURE, *supra* note 1, at 202, 205.

<sup>3</sup> The leading communist regimes (Russia and China) each murdered more people than the Nazi regime, in both absolute *and* per capita numbers. See *infra* Part III.

Part II briefly surveys the American tradition of free speech, finding no constitutional or cultural lineage linking the American tradition of free speech to hate speech regulation proposals. American legal precedents repeatedly contrast free speech with the rigid, censorious totalitarian worldview endemic to communism.<sup>4</sup> Our tradition of free speech is, in fact, fundamentally hostile towards government efforts to restrict speech or prescribe doctrine.<sup>5</sup>

Part III provides a summary of the speech regulations and restrictions on free inquiry characteristic of totalitarian communist regimes. The most apt historical parallels for hate speech regulation are found in the official censorship and informal self-censorship integral to twentieth-century communist regimes, particularly those of the Soviet Union and China.<sup>6</sup> These regimes gave living form to the following insight from Justice Holmes in his dissent in *Abrams v. United States*: “Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition.”<sup>7</sup>

Part IV explores the image of communism portrayed within the ideological confines of academia. Due to leftist hegemony within academia, the brutal history of communism is obscured, minimized, or suppressed altogether.<sup>8</sup> After the fall of communism, intransigent Marxists and defunct revolutionaries explicitly advocated that radicals enter major institutions, particularly schools and universities, in what became known as the “long march through the institutions.”<sup>9</sup>

Part V describes how, despite the fall of Communist regimes, certain Marxist ideals and resentments persisted among many American intellectuals. With those persisting Marxist ideals and resentments follow the disturbing institutional responses characteristic of the underlying ideals—namely, state censorship. As a result of the “long march through the institutions,” Marxism has substantial influence within critical theory, cultural studies, and critical race theory, which are prominent within the

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<sup>4</sup> See *infra* Section II.B.

<sup>5</sup> See *infra* Section II.C.

<sup>6</sup> See *infra* Part III.

<sup>7</sup> Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>8</sup> See *infra* Section IV.A.

<sup>9</sup> See *infra* Section IV.B.

humanities, social sciences, and legal scholarship.<sup>10</sup> The totalitarian communist origins of hate speech regulation can be traced in an essentially chronological order, as this Article sets out to do. Communism's ideological influence descended from the mid-twentieth-century communist regimes, to the Marxist "critical theory" of the Frankfurt School, to various modern offshoots of Marxist critical theory, through to the rigidly institutionalized leftist doctrines in today's academy, such as critical race theory.<sup>11</sup> One influential Marxist and American professor, Herbert Marcuse, promulgated the notion of "repressive tolerance," the most vivid link connecting totalitarianism to modern hate speech regulation.<sup>12</sup> Without a rigorous critique of communism and its methods of control, discourse about hate speech regulation lacks historical context, and academic bias undermines empirical scrutiny of speech regulation.

Part VI critically reappraises the relationship of hate speech regulation to totalitarian communist ideology. Political correctness is the crucial conceptual sinew connecting hate speech regulation to the historical experience of communist rule. Five factors were central to the practical application of communist doctrine: intense group grievances, a sense of victimhood, the desire to impose doctrine, the desire to persecute opposing viewpoints, and strong faith in the state to wisely limit free expression.<sup>13</sup> Those five factors foster the institutional mechanism of speech regulation, linking twentieth-century communism to contemporary hate speech regulation.

Part VI then reconsiders hate speech regulation as a doctrinal enforcement mechanism. Similarly, this Article scrutinizes the policing of "microaggressions" as an effort to demonize ideological opposition and entrench hegemony through the culture of victimhood. Sensitivity training is reinterpreted here as doctrinal re-education. Ultimately, the social sciences are equipped to provide a cogent critique of contemporary hate speech regulation, but these disciplines have utterly failed to challenge the normative and empirical bases of speech regulation. This Article is intended to begin to fill that void in the extant work.

At the outset, it should be noted that this Article does not suggest that proponents of hate speech regulation plan to reproduce Soviet or Maoist

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<sup>10</sup> See *infra* Section V.A.

<sup>11</sup> See *infra* Part V.

<sup>12</sup> Herbert Marcuse, *Repressive Tolerance*, in *A CRITIQUE OF PURE TOLERANCE* 81, 111 (Beacon Press ed., 1970).

<sup>13</sup> See *infra* Part VI.

regimes in every particular. Nor does this Article suggest that all proponents of hate speech regulation are totalitarian.<sup>14</sup> Nonetheless, this Article takes ideological origins seriously. The transmission of earlier forms of thought is surely relevant to later patterns of belief and policy proposals.<sup>15</sup> This is especially true when the influence of Marxism can be directly traced through to the regnant doctrines in academia today: namely, critical theory and related leftist doctrines such as critical race theory.<sup>16</sup> By adopting speech regulation to promote egalitarian ideals, the contemporary left would institutionalize one of the explicit methods of control characteristic of totalitarian regimes. The remorseful epiphanies of fervent revolutionaries echo their warning to us today. Victor Serge, a Russian revolutionary and radical intellectual, wrote in his memoirs, “I immediately discerned within the Russian Revolution the seeds of such serious evils as intolerance and the drive towards the persecution of dissent. These evils originated in an absolute sense of possession of the truth, grafted upon doctrinal rigidity.”<sup>17</sup> Before exploring the persistent influence of totalitarian ideology on modern hate speech regulation, Part II briefly surveys the contrasting American tradition of free speech, which is firmly rooted in the Founding principle of severe distrust towards government regulation of speech.<sup>18</sup>

## II. FREE SPEECH AND TOTALITARIANISM IN THE AMERICAN LEGAL TRADITION

One searches in vain to find an American historical precedent for hate speech regulation. Justice Jackson’s concise assertion expresses the time-honored American distrust of state-enforced orthodoxy: “[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or

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<sup>14</sup> As philosophy professor Andrew Altman notes, it is difficult to claim “that any hate-speech regulation is a step down the slippery slope to the totalitarian control of ideas.” Andrew Altman, *Liberalism and Campus Hate Speech: A Philosophical Examination*, 103 ETHICS 302, 316 n.33 (1993).

<sup>15</sup> See generally, e.g., BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967) (exploring the intellectual roots, key language, and argumentation of Colonial American responses to the rule of King George III and Parliament).

<sup>16</sup> See *infra* Section V.A.

<sup>17</sup> VICTOR SERGE, MEMOIRS OF A REVOLUTIONARY 374–75 (Peter Sedgwick trans., Oxford University Press 1980) (1951).

<sup>18</sup> See *infra* Part II.

act their faith therein.”<sup>19</sup> The American legal tradition poignantly contrasts the free society with totalitarian regimes, as indicated by Justice Stewart: “Censorship reflects a society’s lack of confidence in itself. It is a hallmark of an authoritarian regime.”<sup>20</sup> As was the case with many of the constitutional protections included in our founding documents, bitter experience under abusive central government authority shaped the Founding Fathers’ beliefs about free speech.<sup>21</sup>

Within the American constitutional tradition, one finds constant warnings against totalitarian tendencies. Criticizing Parliament in 1774, Thomas Jefferson said, “Hi[s]tory has informed us that bodies of men, as well as individuals, are [s]u[s]ceptible of the [s]pirit of tyranny.”<sup>22</sup> Such warnings are especially prominent in American jurisprudence for two reasons. First and fundamentally, the nation itself was founded upon opposition to an overbearing centralized government authority.<sup>23</sup> Second, the encounter with totalitarian ideologies throughout the twentieth century further impressed upon many American jurists the wisdom of strictly circumscribing government authority in matters of speech and doctrine.<sup>24</sup>

#### *A. The Founding Principles*

The Founders were generally opposed to utopian social theories, and they did not trust the government to regulate speech. In *The Federalist Papers No. 6*, Hamilton asks, “Have we not already seen enough of the fallacy and extravagance of those idle theories which have amused us with promises of an exemption from the imperfections, the weaknesses, and the evils incident to society in every shape?”<sup>25</sup> After several years in Europe, Jefferson wrote, “If anybody thinks that kings, nobles, or priests are good conservators of the public happiness, send him [to Europe].”<sup>26</sup> These attitudes towards government and society would profoundly shape the

<sup>19</sup> W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

<sup>20</sup> Ginzburg v. United States, 383 U.S. 463, 498 (1966) (Stewart, J., dissenting).

<sup>21</sup> See *infra* Section II.A.

<sup>22</sup> THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA 9 (photo. reprint 1943) (1774).

<sup>23</sup> BAILY, *supra* note 15, at 82–83.

<sup>24</sup> Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 278 (2009).

<sup>25</sup> THE FEDERALIST No. 6, at 59 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>26</sup> Letter from Thomas Jefferson to George Wythe (Aug. 13, 1786), in THE WRITINGS OF THOMAS JEFFERSON 394, 396 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

development of our Constitution. Frederick Schauer writes, “Not only the first amendment, but also the very idea of a principle of freedom of speech, is an embodiment of a risk-averse distrust of decisionmakers.”<sup>27</sup> To Schauer, “the first amendment’s foundations lie not with ideal aspirations, but instead with the kind of arguably necessary pessimism”<sup>28</sup> towards human nature and government expressed in James Madison’s memorable observation: “If men were angels . . . no government would be necessary.”<sup>29</sup>

The Founders shared the “assumption that the press was the best safeguard against the abuse of authority by people in positions of power.”<sup>30</sup> The Founders viewed government as an inherently power-hungry institution, not to be trusted, which would consistently seek to amass more power, and then abuse that authority.<sup>31</sup> As generations of historians assert, one of the core principles of the founding was that rights “must be protected against the whims of arbitrary power.”<sup>32</sup> Jefferson, for example, believed “that freedom was in its nature a fragile plant that had been and would be, again and again, overwhelmed by the forces of power; that where freedom had survived it remained beset by those who lusted for domination.”<sup>33</sup> Malone writes that, to Jefferson, “the most important of all rights—the truly inalienable ones—were the sanctity of the person and the freedom of the mind.”<sup>34</sup> The Founders, given their keen interest in the history of European governments and sectarian conflict, understood well that regimes based on fixed orthodoxy are prone to wield force to maintain that orthodoxy.<sup>35</sup> There was at least one form of speech regulation in one

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<sup>27</sup> Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 2 (1989).

<sup>28</sup> *Id.* at 1–2.

<sup>29</sup> *Id.* at 1 (quoting THE FEDERALIST NO. 51, at 160 (James Madison) (Fairfield 2d ed., 1981)).

<sup>30</sup> Michael Lienesch, *Thomas Jefferson and the American Democratic Experience: The Origins of the Partisan Press, Popular Political Parties, and Public Opinion*, in JEFFERSONIAN LEGACIES 316, 318 (Peter S. Onuf ed., 1993).

<sup>31</sup> JEFFERSON, *supra* note 22, at 9.

<sup>32</sup> CLINTON ROSSITER, *CONSERVATISM IN AMERICA* 106 (2d ed. rev., 1966).

<sup>33</sup> BERNARD BAILYN, *TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS* 45 (2003).

<sup>34</sup> DUMAS MALONE, *JEFFERSON AND THE RIGHTS OF MAN* 153 (1951).

<sup>35</sup> EDWARD PETERS, *INQUISITION* 163 (1989) (“Portugal, Spain, and Rome were unique in seventeenth-century Europe in terms of their religious unity and their mechanisms of (continued)

of the colonies.<sup>36</sup> However, the overall intellectual thrust of the Founders and their contemporaries was to distrust the government and resist any governmental effort to impose correct thought or speech.<sup>37</sup>

Early experience taught Americans that speech-based crimes were an engine for viciously subjective interpretation and rampant persecution of political opponents. The Alien and Sedition Acts of 1798 threatened jail or fines for those who spoke or wrote about Congress or the President in a “false, scandalous, and malicious” manner, had the intent to bring those authorities into “contempt or disrepute,” or even had the intent to “excite” hatred against them.<sup>38</sup> “Any criticism of government, any misgiving, any question, distrust, or skepticism, could be grounds for bringing someone into court and convicting them,” as Louis Fisher notes.<sup>39</sup> The Sedition Act dramatized to friends of liberty that there are simply “not meaningful standards that might guide a jury or a court in judging an alleged verbal crime.”<sup>40</sup> Moreover, the Sedition Act illustrated the impossibility of “an impartial verdict in political trials” when political or opinionated speech is at issue.<sup>41</sup> The furious early American response to the Sedition Act ushered in what Leonard Levy described as an “absolutist interpretation of the First Amendment . . . based on the now familiar, but then novel and democratic, theory that free government depends for its very existence and security on freedom of political discourse.”<sup>42</sup>

The government should not have the power to limit speech, so it follows that official attempts to dictate virtue were unwelcome in the American legal tradition. Suzanna Sherry notes, “American republicans and those who influenced them have recognized the impossibility of

persecution. In European eyes, such unity of religious belief and practice necessarily had to depend upon force or social enervation, for it could no longer be viewed as voluntary.”).

<sup>36</sup> Michael W. McConnell, *America's First “Hate Speech” Regulation*, 9 CONST. COMMENT. 17, 17 (1992) (“An examination of the Maryland Toleration Act of 1649 thus suggests that we should not accept too quickly the common position of conservatives and ACLU liberals that hate speech regulation is, in principle, contrary to the requirements of a free society.”).

<sup>37</sup> See, e.g., BAILYN, *supra* note 33, at 45; MALONE, *supra* note 34, at 153.

<sup>38</sup> Alien and Sedition Acts of 1798, ch. 74, § 2, 1 Stat. 596 (repealed 1801).

<sup>39</sup> Louis Fisher, *Preserving Constitutional Freedoms in Times of National Crisis*, 33 VT. L. REV. 627, 632 (2009).

<sup>40</sup> LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 216 (1988).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 217.

coercing virtue.”<sup>43</sup> John Locke, for instance, was an early critic of official efforts to impose virtue: “[I]t is one thing to persuade, another to command; one thing to press with arguments, another with penalties.”<sup>44</sup> Locke’s core distinctions infuse our free speech jurisprudence. While the Founders encouraged revolt against government tyranny,<sup>45</sup> another leading figure of the republican tradition pointed to the toll of human silence that invariably followed orthodoxy.<sup>46</sup> Abraham Lincoln wrote of the distinction between persuading and commanding.<sup>47</sup> Lincoln warned that, when you endeavor to convince another person of your views, if you “assume to dictate to his judgment, or to command his action, or to mark him as one to be shunned and despised, and he will retreat within himself, close all the avenues to his head and his heart.”<sup>48</sup> Similarly, Locke insisted that, as a matter of principle, the good citizen should not wish to chill speech or induce self-censorship in others.<sup>49</sup> The chilling effect is defined in the American legal tradition as “‘a reaction of self-censorship’ on matters of public import.”<sup>50</sup> Fundamental conflict between free expression and government control would emerge again during the Cold War.

### B. The Response to Totalitarianism

The Cold War raised the specter of tyrannical governments abroad and overbearing government at home. Justice Douglas, in a 1951 speech, warned:

We know that the Communist threat is the basis of the fears that sweep our communities. We know that that threat has substance to it. We know that Communist cells are much more dangerous than any Jacobin Club or Fabian

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<sup>43</sup> Suzanna Sherry, *Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech*, 75 MINN. L. REV. 933, 935 (1991).

<sup>44</sup> John Locke, *A Letter Concerning Toleration*, in 6 THE WORKS OF JOHN LOCKE 11 (photo. reprint 1963) (1823).

<sup>45</sup> MALONE, *supra* note 34, at 158.

<sup>46</sup> Abraham Lincoln, Address to the Washington Temperance Society of Springfield, Illinois (Feb. 22, 1842), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858, at 81, 85 (1989).

<sup>47</sup> *Id.* at 83.

<sup>48</sup> *Id.*

<sup>49</sup> Locke, *supra* note 44, at 11.

<sup>50</sup> Snyder v. Phelps, 562 U.S. 443, 452 (2011) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760 (1985) (plurality opinion)).

society or Socialist party ever was. . . . But we also know that the safety of our civilization lies in making freedom of thought and freedom of speech vital, vivid features of our life.<sup>51</sup>

Justice Douglas asserted that, rather than adopting the speech controls characteristic of totalitarian societies, “[i]t is our attitude toward free thought and free expression that will determine our fate. There must be no limit on the range of temperate discussion, no limits on thought.”<sup>52</sup> At a time in history when fears of communist subversion abounded, including—as Justice Douglas noted—credible fears, Justice Douglas nevertheless counseled, “Restriction of free thought and free speech is the most dangerous of all subversions.”<sup>53</sup> Alexander Meiklejohn, in his book, *Political Freedom: The Constitutional Powers of the People*, put the stakes this way: “To be afraid of any idea is to be unfit for self-government.”<sup>54</sup> What emerged from America’s historical experience, and the principles of republicanism, was a future-oriented mistrust of government and a steadfast refusal to take the government at its word when it claimed good intentions to regulate speech responsibly.

### C. Future-Oriented Mistrust of Government

The American tradition of free speech is future-oriented in that it anticipates governmental attempts to censor or enforce orthodoxy. To the Founders, Anglo-American history stood as a warning that “[g]overnment officials have an inherent conflict of interest whenever they regulate commentary on their conduct in office or on the policies they favor or fear.”<sup>55</sup> A core characteristic of the Founding ideology was the belief that governmental abuses would occur; it was only a matter of when.<sup>56</sup> Sherry writes, “For most eighteenth-century Americans, politics could be reduced

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<sup>51</sup> William O. Douglas, *The One Un-American Act*, NIEMAN REPORTS, Jan. 1953, at 20. See also Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873, 881–82 (1993) (giving examples of World War I-era attempts in the U.S. to “stifle criticism of military activities,” and “suppress support of Communism,” and pointing to “government-favored anti-abortion speech.”).

<sup>52</sup> Douglas, *supra* note 51, at 20.

<sup>53</sup> *Id.*

<sup>54</sup> ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 124 (1965).

<sup>55</sup> KEITH WERHAN, FREEDOM OF SPEECH 39 (2004).

<sup>56</sup> See THE FEDERALIST NO. 51, *supra* note 25, at 322 (James Madison).

to its essential character: a constant struggle between power and liberty.”<sup>57</sup> As Lance Banning detailed, “[T]he assumption of human selfishness, the very principle that required a government of divided powers, induced in America as in England an expectation of constitutional decay.”<sup>58</sup> In choosing free speech as a rule, the Founders made “an assessment that the relevant addressee of the rule, [meaning] an official or class of officials, is not to be trusted to make [a] case-sensitive evaluation” of whether a particular expression serves any justification or ideal.<sup>59</sup>

For the generation steeped in republicanism, “the Sedition Act struck at the very foundations of representative government by making criticism of the rulers and their measures a criminal offense.”<sup>60</sup> That attempt to restrict popular opinion “was the conclusive demonstration [that antidemocratic factions] lack confidence in the people.”<sup>61</sup> To this day, the distrust of government abides in decisions like *Heller*, which actually anticipates potential abuses of power: “A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.”<sup>62</sup> When the government acts to restrict speech, the government does so in order to impose some doctrinally desired outcome.<sup>63</sup> To guard against that threat, “above all else, the First Amendment means that government has no power to restrict expression because of its

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<sup>57</sup> Suzanna Sherry, *The Intellectual Origins of the Constitution: A Lawyers’ Guide to Contemporary Historical Scholarship*, 5 CONST. COMMENT. 323, 328 (1988).

<sup>58</sup> LANCE BANNING, THE JEFFERSONIAN PERSUASION 201 (1980).

<sup>59</sup> Schauer, *supra* note 27, at 16.

<sup>60</sup> BANNING, *supra* note 58, at 260.

<sup>61</sup> *Id.* at 261.

<sup>62</sup> District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008). The *Heller* majority provided an evocative comparison of the rights secured by the First and Second Amendments:

We would not apply an “interest-balancing” approach to the prohibition of a peaceful neo-Nazi march through Skokie. The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very product of an interest balancing by the people . . . .

*Id.* at 635 (internal citations omitted).

<sup>63</sup> See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).

message, its ideas, its subject matter, or its content.”<sup>64</sup> Content-based regulations violate the protected norm of free expression.<sup>65</sup> A policy designed to limit speech should be understood as a predictor of further efforts at government control.<sup>66</sup> “Governments that want stasis start by restricting speech.”<sup>67</sup> Werhan observes, “History . . . suggests that government officials, if left to their own devices, tend to overregulate speech,”<sup>68</sup> which validates Madison’s concern about official power.<sup>69</sup>

Governments naturally insist that censorship will be implemented responsibly, and censors proclaim their idealistic “humanitarian” goals.<sup>70</sup> These guarantees count for nothing in America’s constitutional heritage. With history as our guide, no weight should be given to doctrines and ideals placed in the service of speech regulation. After all, the purported goal to “serve the people” was trumpeted by the most tyrannical regimes in modern history.<sup>71</sup> Well-intentioned movements—probably as often as cynical ones—have empowered unjust governments. Historically, the gap between good intentions and actual consequences can be measured in mountains of skulls, volumes of unwritten words, and thoughts terrified of utterance. With the memory of Russian communist violence in mind, Serge wrote, “We revolutionaries, who aimed to create a new society, ‘the

<sup>64</sup> *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). *See also Turner Broad. Sys.*, 512 U.S. at 641 (“[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals.”); *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (“The ordinance discriminates on the ground of the content of the speech. . . . The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.”).

<sup>65</sup> *Mosley*, 408 U.S. at 95.

<sup>66</sup> *See Mosley*, 408 U.S. at 95–96.

<sup>67</sup> *Am. Booksellers*, 771 F.2d at 332.

<sup>68</sup> WERHAN, *supra* note 55, at 38.

<sup>69</sup> THE FEDERALIST NO. 51, *supra* note 25, at 322 (James Madison).

<sup>70</sup> JONATHAN RAUCH, KINDLY INQUISITORS: THE NEW ATTACKS ON FREE THOUGHT 123 (1993) (describing the “humanitarian threat” to free thought and expression, arguing, “The Inquisition was a policing action. But by its own lights it was a humanitarian action, too.”).

<sup>71</sup> See Mao Tse-Tung, Serve the People (Sept. 8, 1944), in SERVE THE PEOPLE 5 (Foreign Languages Press 1967); NIEN CHENG, LIFE AND DEATH IN SHANGHAI 498 (1988) (“‘To serve the people’ was perhaps the most publicized slogan of the Chinese Communist Party. . . . Whenever the Party wanted a man to do something he did not want to do, the official would ask, ‘Don’t you want to serve the people?’”).

broadest democracy of the workers', [sic] had unwittingly, with our hands, constructed the most terrifying State machine conceivable . . . ."<sup>72</sup> Even the most pure-hearted revolutions may lapse into abject tyranny. For that reason, government proclamations of good intentions are meaningless. *United States v. Stevens* asserted that "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."<sup>73</sup> Even when the government claims to act on behalf of community sensibilities, free speech remains sacrosanct. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>74</sup> The expression of offensive ideas is preferable to the alternative, which is to put the power of official censorship into the hands of conflicting interest groups, based on race, class, gender or any other dividing line. If government wields the censors' tools, there will be no end to the abuses; group grievances—real or imagined—would fuel ceaseless demands to target speech by opposing groups. This is especially true in a society, like our own, where there appears to be a deeply rooted shift towards a culture of victimhood among a growing segment of the population.<sup>75</sup>

Justice Douglas set forth the proper role of government in matters of free speech, writing, "The purpose of the Constitution and Bill of Rights, unlike more recent models promoting a welfare state, was to take government off the backs of people."<sup>76</sup> The welfare state, through hate speech regulation, could easily be empowered to address demands for protection against supposedly hurtful speech. However, existing law treats the individual in a free society as capable of avoiding offensive

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<sup>72</sup> SERGE, *supra* note 17, at 380.

<sup>73</sup> 559 U.S. 460, 480 (2010).

<sup>74</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

<sup>75</sup> See *infra* Section VI.C; Bradley Campbell & Jason Manning, *Microaggression and Moral Cultures*, 13 COMP. SOC. 692, 692 (2014).

<sup>76</sup> *Schneider v. Smith*, 390 U.S. 17, 25 (1968). But cf. Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 173 (1990) ("Only through communal living and through the state may men achieve virtue; only through the state may they find true peace, happiness, and fulfillment.").

messages.<sup>77</sup> As the Court held in *Erznoznik v. City of Jacksonville*, society can respond to offensive speech by allowing the unwilling listener or viewer to turn away from the source of offense.<sup>78</sup> The ordinary citizen is capable of disagreeing with, or simply avoiding, offensive messages.<sup>79</sup> This social norm renders state regulation of speech unnecessary in all but the most extreme cases. Even for unwilling listeners, “the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather . . . the burden normally falls upon the viewer to ‘avoid further bombardment of [his] sensibilities simply by averting [his] eyes.’”<sup>80</sup> This social norm is now threatened by political correctness and the hegemonic ideological doctrine ensconced in American higher education, a topic this Article returns to in Part V.

On matters of free speech within the American constitutional tradition, the relationship between courts and governments is properly characterized as one of deep mistrust. Courts rightly reject the government’s assurances about benevolent speech restriction. Recall Justice Roberts’ remark in *Stevens*, that “[w]e would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”<sup>81</sup> We continue to hear echoes of Thomas Jefferson’s famous remark, “I am not a friend to a very energetic government. It is always oppressive.”<sup>82</sup> Courts have ample basis in experience for their distrust towards government promises, and vaguely-worded statutes only reinforce that distrust.<sup>83</sup> Consider the district court’s observation in *Doe v. University of Michigan*:

<sup>77</sup> *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975); *Cohen v. California*, 403 U.S. 15, 21 (1971); *Spence v. Washington*, 418 U.S. 405, 412 (1974); *Redrup v. New York*, 386 U.S. 767, 769 (1967).

<sup>78</sup> *Erznoznik*, 422 U.S. at 210–11.

<sup>79</sup> *Id.* at 212.

<sup>80</sup> *Id.* at 210–11 (quoting *Cohen*, 403 U.S. at 21).

<sup>81</sup> *United States v. Stevens*, 559 U.S. 460, 480 (2010).

<sup>82</sup> Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 436, 440 (Adrienne Koch & William Peden eds., 1944).

<sup>83</sup> *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 283–84 (1961). See also *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); *Cline v. Frink Dairy Co.*, 274 U.S. 445, 465 (1927); *Stromberg v. California*, 283 U.S. 359, 369 (1931); *Herndon v. Lowry*, 301 U.S. 242, 258–59 (1937); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Winters v. New*

(continued)

During the oral argument, the Court asked the University's counsel how he would distinguish between speech which was merely offensive, which he conceded was protected, and speech which "stigmatizes or victimizes" on the basis of an invidious factor. Counsel replied "very carefully." The response, while refreshingly candid, illustrated the plain fact that the University never articulated any principled way to distinguish sanctionable from protected speech.<sup>84</sup>

Moreover, in *Stevens*, the Court stated, "The Government's assurance that it will apply [a statute] far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading."<sup>85</sup> There is much dispute over the proper criteria for hate speech.<sup>86</sup> Even while acknowledging the occasional harm of racist speech, courts should maintain their opposition to speech regulation, in light of the dreadful record of state orthodoxy and speech control.

#### *D. Persecution for Opinions is Perfectly Logical, to the Totalitarian*

Justice Holmes, in his dissent in *Abrams v. United States*, observed that "[p]ersecution for the expression of opinions [is] perfectly logical."<sup>87</sup> "If you have no doubt of your premises or your power and want a certain result . . . you naturally express your wishes in law and sweep away all

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York, 333 U.S. 507, 510 (1948); Smith v. California, 361 U.S. 147, 151 (1959); Thornhill v. Alabama, 310 U.S. 88, 96–98 (1940).

<sup>84</sup> 721 F. Supp. 852, 867 (E.D. Mich. 1989). See also Robert M. O'Neil, *Hate Speech, Fighting Words, and Beyond—Why American Law is Unique*, 76 ALB. L. REV. 467, 484 (2013) ("Every case that has been brought against a public university on the basis of such a code has been decided against the institution, on free speech or due process grounds or both.").

<sup>85</sup> *Stevens*, 559 U.S. at 480.

<sup>86</sup> See, e.g., Erwin Chemerinsky, *Unpleasant Speech on Campus, Even Hate Speech, Is a First Amendment Issue*, 17 WM. & MARY BILL OF RTS. J. 765, 768–70 (2009) (discussing a scholarly disagreement over the criteria for defining "anti-Semitic" and "anti-Jewish" speech); Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 215–16 (1991) (discussing "the formidable problems of defining an epithet or slur").

<sup>87</sup> 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

opposition.<sup>88</sup> A variety of interest groups could be found, in any era, exhibiting the desire to manipulate and control others or to demonize those who disagree with cherished beliefs.<sup>89</sup> The government is the preferred tool for this “perfectly logical” persecution, whether government is in the hands of factions purporting to represent minorities, or to represent the majority. Because opposing points of view can highlight conflicting interests and challenge entrenched interests, the government is quite naturally a coveted weapon for censors.<sup>90</sup> Justice Holmes’s *Abrams* dissent applies today to the critical race theorists and the growing segment of like-minded students who appear ready to repress the mere discussion of opposing views.<sup>91</sup> Speech regulation remains an avenue for the timeless

<sup>88</sup> *Id.*

<sup>89</sup> See Erwin Chemerinsky, *Students Do Leave Their First Amendments Rights at the Schoolhouse Gates: What’s Left of Tinker?*, 48 DRAKE L. REV. 527, 546 (2000) (“School officials—like all government officials—often will want to suppress or punish speech because it makes them feel uncomfortable, is critical of them, or just because they do not like it.”); Kagan, *supra* note 51, at 882 (acknowledging “the tendency of governmental actors (of all kinds) to see speech regulation through the lens of their own orthodoxies, as well as the ease with which such orthodoxies can thereby become entrenched.”).

<sup>90</sup> See NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER 2 (1992) (criticizing the increase in censorship by educational and governmental bodies).

<sup>91</sup> See, e.g., Jillian Lanney & Carolyn Cong, *Ray Kelly Lecture Canceled Amidst Student, Community Protest*, BROWN DAILY HERALD (Oct. 30, 2013), <http://www.brown daily herald.com/2013/10/30/ray-kelly-lecture-canceled-amidst-student-community-protest/> [<https://perma.cc/ZT2W-NZKS>]. Prior to a speech at Brown University by New York City Police Department Commissioner Ray Kelly, the director of the university venue stated that “protest is a necessary and acceptable means of demonstration at Brown University,” but asked protesters not to interrupt the lecture because interruptions would prevent the public from listening to and communicating with Kelly. *Id.* Reportedly:

[a]s soon as [Kelly] began to speak, many protesters stood with their fists in the air and began shouting in unison, after which neither Kelly nor Vice President for Campus Life and Student Services Margaret Klawunn and Vice President for Public Affairs and University Relations Marisa Quinn—two administrators present—could regain control of the auditorium.

*Id.*

dangers of ideological dogma, group resentment, and tribalism<sup>92</sup> to gain power through government authority. Incentives for censorship abound today; pseudoscientific notions of “white privilege” and “microaggressions” are conducive to self-righteous victimhood and politicized resentment.<sup>93</sup> Politicians are inclined to seize on intellectual fads that justify the aggrandizement of the state over citizens, especially when power is accrued in the name of goals like “equality.”<sup>94</sup> Worst of all, violence may accompany the goals of promoting equality and countering inequality; the worst mass violence in modern history was committed by the state in the name of “equality, shared wealth, and dignity for all.”<sup>95</sup> In a resurgence of grievance and victimhood, some radicals today believe that their ideological opponents are actual aggressors.<sup>96</sup> Contemporarily,

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<sup>92</sup> The term “tribalism” accurately captures the dynamic of psychological intensity and group-based resentment. See, e.g., ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA 13–14 (rev. ed., W.W. Norton & Co. 1998) (warning that the “virus of tribalism” was spreading throughout the globe); Grutter v. Bollinger, 539 U.S. 306, 349 (2003) (Scalia, J., dissenting) (noting that some schools practice “tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.”).

<sup>93</sup> Leftist women’s studies professor Peggy McIntosh coined the term “white privilege” and defined it as “an invisible package of unearned assets that [whites] can count on cashing in each day.” Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies*, in POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER 22, 23 (Leslie Bender & Daan Braveman eds., 1995). McIntosh wrote, “White privilege is like an invisible weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks.” *Id.*

<sup>94</sup> Eugene D. Genovese, *The Question*, 41 DISSENT 371, 373 (1994) (historian and former communist noting communism’s “grand liberation featured hideous political regimes under which no sane person would want to live”).

<sup>95</sup> Roy F. Baumeister & W. Keith Campbell, *The Intrinsic Appeal of Evil: Sadism, Sensational Thrills, and Threatened Egotism*, 3 PERSONALITY & SOC. PSYCHOL. REV. 210, 210 (1999) (asserting that the “highest body counts in history were achieved in the Stalinist and Maoist purges, each of which is currently estimated at having caused more than 20 million deaths.”).

<sup>96</sup> See Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/> [https://perma.cc/R6SR-KJV8]. Lukianoff and (continued)

Lukianoff and Haidt note that partisanship has intensified dramatically over the past several decades.<sup>97</sup> Calls for censorship emerge from intensifying partisanship and identity group grievances. Under these conditions, calls for censorship should be expected to persist. State authority is increasing, and the clamoring for official speech regulation grows louder, as Part VI will describe.

Supporters of speech regulation express great faith in the state to “serve the people” by responsibly controlling speech.<sup>98</sup> For example, Smolla describes the “Aristotelian impulse” that motivates speech regulation: “Only through communal living and through the state may men achieve virtue; only through the state may they find true peace, happiness, and fulfillment.”<sup>99</sup> Smolla observes that this “Aristotelian impulse” may guide legislation, claiming, “When this Aristotelian impulse becomes the dominant mode of thinking in a society, there will be an inexorable tendency for the state to think that it is reasonable to exercise control over speech.”<sup>100</sup> It would be perfectly logical to persecute expression, from that standpoint. A cursory familiarity with history establishes that some politicians will be content to accrue power by taking freedoms away from “nonfavored”<sup>101</sup> groups, always with the best of intentions—to “serve the people,” no doubt. Experience continually validates the culture of distrust towards the state in matters of speech regulation. Owen Fiss, however, advocated that courts, when resolving conflicts between liberty and equality in the domain of expression, should find that a “certain measure of partiality [in favor of equality] may be acceptable, and indeed necessary.”<sup>102</sup> Partiality and favoritism should be expected from any regime of hate speech regulation. Indeed, Richard Delgado explicitly describes the racial favoritism of his content-based proposal, which “is

Haidt assert that the movement to suppress speech “is creating a culture in which everyone must think twice before speaking up, lest they face charges of insensitivity, aggression, or worse.” *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> See, e.g., CHENG, *supra* note 71, at 498.

<sup>99</sup> Smolla, *supra* note 76, at 173.

<sup>100</sup> *Id.*

<sup>101</sup> The term “nonfavored” is the Orwellian term adopted by the *Grutter* majority to describe nonminorities and other groups not selected by the state for official favoritism. *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003).

<sup>102</sup> Owen M. Fiss, *The Supreme Court and the Problem of Hate Speech*, 24 CAP. U. L. REV. 281, 290–91 (1995).

intended primarily to protect members of racial minority groups traditionally victimized.”<sup>103</sup> Likewise, Victor Romero openly calls for differential treatment of whites in his proposed speech regime: “[W]hites should bear the burden of hurtful speech because they are more likely to be protected by the First Amendment than similarly situated nonwhites.”<sup>104</sup> However, under existing law, the government is prohibited from inscribing race-based favoritism into speech regulation.<sup>105</sup> The Minnesota statute at issue in *R.A.V. v. City of St. Paul* was found to have violated the Constitution because it targeted forms of speech “that communicate messages of racial, gender, or religious intolerance.”<sup>106</sup> The Minnesota statute demonstrated a simple dynamic: to target particular expressions is, by definition, to favor the groups who are thought to need protection against those expressions.<sup>107</sup> Hence the vital principle of viewpoint neutrality. Altman, a liberal, dismisses concerns about viewpoint neutrality, arguing, “[I]t is not at all clear that the biased application of rules is any more of a problem with rules that are not viewpoint-neutral than with those that are” and therefore “the potential for abusive enforcement is no basis for rejecting [hate speech regulation].”<sup>108</sup> Altman, and the left generally, would have us believe that biased application of viewpoint discrimination will be no worse than biased application of viewpoint-neutral rules.<sup>109</sup> This attitude towards government typifies speech regulation proponents. This attitude seems oblivious to the established record of government censorship, especially when that censorship is enacted for lofty goals. As the Soviet and Chinese experiences illustrate, the most progressive ideals imaginable resulted in colossal slaughter, under regimes that were empowered, aided, and abetted

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<sup>103</sup> Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 180 n.275 (1982).

<sup>104</sup> Victor C. Romero, *Restricting Hate Speech Against “Private Figures”: Lessons in Power-Based Censorship from Defamation Law*, 33 COLUM. HUM. RTS. L. REV. 1, 17 (2001).

<sup>105</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

<sup>106</sup> *Id.* at 394 (“Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid . . . ”).

<sup>107</sup> *Id.* at 392.

<sup>108</sup> Altman, *supra* note 14, at 316.

<sup>109</sup> *Id.* Altman acknowledges that “rules against hate speech are not viewpoint-neutral.” *Id.* at 304.

by speech regulation.<sup>110</sup> Viewpoint neutrality is therefore a principle vital to the preservation of free inquiry and open societies. The American constitutional tradition protects this vital principle.

The record of American hate speech censorship provides little basis for optimism about the wisdom of censors or the competence of bureaucrats—to say nothing of their fidelity to the Constitution.<sup>111</sup> Would-be censors presume that only “bigots” will have their speech penalized by hate speech regulation.<sup>112</sup> That assumption bespeaks optimism towards the aptitude of government officials to appropriately regulate speech. Such optimism is totally unwarranted, given the brutal modern history of government persecution,<sup>113</sup> institutionally mandated indoctrination,<sup>114</sup> political scapegoating,<sup>115</sup> blame shifting,<sup>116</sup> and sinister attributions against political opponents.<sup>117</sup>

<sup>110</sup> See generally SERGE, *supra* note 17; FRANK DIKÖTTER, MAO'S GREAT FAMINE (2010).

<sup>111</sup> See, e.g., Doe v. Univ. of Mich., 721 F. Supp. 852, 868 (E.D. Mich. 1989) (“[T]here is no evidence in the record that any officials at the University ever seriously attempted to reconcile their efforts to combat discrimination with the requirements of the First Amendment.”).

<sup>112</sup> See Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 764 (2000) (“Hate speech laws’ potential to safeguard human rights outweighs the interest of bigots in spreading their false stereotypes about outgroups.”).

<sup>113</sup> SIMON LEYS, CHINESE SHADOWS 47 (1977) (describing how, during the Cultural Revolution, the government enforced “the obligation to be present at, if not to take an active part in, the public denunciation of neighbors, friends, fellow workers, and parents [and that] all this must have put its mark on the society as a whole.”). Leys was the pseudonym of Sinologist Pierre Ryckmans. *Obituary: Pierre Ryckmans (Simon Leys), an Old China Hand, Died on August 11th, Aged 78*, ECONOMIST (Aug. 23, 2014) [hereinafter *Pierre Ryckmans Obituary*], <http://www.economist.com/node/21613159/print> [<https://perma.cc/2H3U-GR9Q>].

<sup>114</sup> Aaron Wildavsky, *Politically Correct Hiring Will Destroy Higher Education*, 7 ACAD. QUESTIONS 77, 78–79 (1994) (“If there is no truth outside of group identification, and if truth is only the servant of power, those who have power in society will feel possessed of the right to remake universities in their own image. Hence American universities will follow the processes by which many Latin American universities have become so politicized that their character changes with alterations in regime.”).

<sup>115</sup> CHENG, *supra* note 71, at 285 (“One of the most ugly aspects of life in Communist China during the Mao Zedong era was the Party’s demand that people inform on each other  
(continued)

Some hate speech regulation proponents recognize the dangers of officially imposed orthodoxy.<sup>118</sup> Mari Matsuda, a prominent speech regulation advocate, conceded that “a formal, legal-structural response to racist speech goes against the long-standing and healthy American distrust of government power.”<sup>119</sup> Critical race theorist Judith Butler acknowledged that hate speech regulation could empower the state to suppress the speech of unpopular or marginalized groups.<sup>120</sup> Nonetheless, these and other academics advocate that the state serve as arbiter of orthodoxy.<sup>121</sup> In fairness, the moderate liberal tradition in America was ordinarily opposed to the regulation of political speech.<sup>122</sup> However,

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routinely and denounce each other during political campaigns. This practice had a profoundly destructive effect on human relationships.”).

<sup>116</sup> MARK GRAUBARD, WITCHCRAFT AND THE NATURE OF MAN 286 (1984) (“The purge trials of the Soviet Union under Stalin’s dictatorship, which were interrupted by World War II but which resumed their intensified ruthlessness at its termination until the tyrant’s death in 1953, show the basic identity of human conduct under the influence of the blame complex in our times as in the past.”).

<sup>117</sup> “Symbolic racism” is supposedly demonstrated in affirmative answers to survey questions such as, “do blacks get more attention from the government than they deserve; should [blacks] work their ways up without special favors; and are [blacks] too demanding in their push for equal rights.” David O. Sears et al., *Cultural Diversity and Multicultural Politics: Is Ethnic Balkanization Psychologically Inevitable*, in CULTURAL DIVIDES 35, 73 (Deborah A. Prentice & Dale T. Miller eds., 1999).

G.E. Zuriff notes that if affirmative answers to these questions are interpreted as “racist,” then leftist academics “have ensured that racism will endure as long as Americans disagree on racial policies, because one side of the debate will be declared racist.” G.E. Zuriff, *Inventing Racism*, 146 PUB. INT. 114, 128 (2002).

<sup>118</sup> Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2322 (1989).

<sup>119</sup> *Id.*

<sup>120</sup> JUDITH BUTLER, EXCITABLE SPEECH 24 (1997) (warning that hate speech regulations risk “potentially empowering the state to invoke such precedents against the very social movements that pushed for their acceptance as legal doctrine.”).

<sup>121</sup> *Id.* at 23.

<sup>122</sup> See, e.g., HENTOFF, *supra* note 90, at 58 (criticizing the increase in censorship by educational and governmental bodies); Morris Dickstein, *Correcting PC*, in OUR COUNTRY, OUR CULTURE: THE POLITICS OF POLITICAL CORRECTNESS, *supra* note 1, at 42, 43 (political correctness “conflicts dramatically with any known form of liberalism”).

patterns of thought are always subject to change, and the liberalism of yesterday gives way to the intolerant leftist doctrine of today's campus.

The American tradition of free speech is pessimistic about the government's competence to appropriately regulate speech. The government is forbidden from acting as arbiter of official orthodoxy.<sup>123</sup> When freedom of speech is at stake, the government's stated intention to remedy social problems or redress inequality carries no authority.<sup>124</sup> Censors will proclaim their good intentions, as they always have, as the communists did for decades, even as the human toll was piling high. Indeed, as Paul Hollander observes, “[T]he continued attractiveness of communism rests on the human capacity to dissociate ends from means, good intentions from poor results, ideals from realities, and theory from practice.”<sup>125</sup> Part III will describe the noteworthy historical accomplishments of communism—namely, mass slaughter and censorship. Later sections explore the manner in which intellectual bias minimizes the crimes of communism, thus creating an analytical silence that protects hate speech regulation from scrutiny.

### III. COMMUNISM IN THE HISTORICAL RECORD

*Communism has been the greatest social engineering experiment we have ever seen. It failed utterly and in doing so it killed over 100,000,000 men, women, and children . . . But there is a larger lesson to be learned from this horrendous sacrifice to one ideology. That is that no one can be trusted with power.*<sup>126</sup>

- R.J. Rummel

<sup>123</sup> See Bd. of Educ. v. Pico, 457 U.S. 853, 872 (1982) (Blackmun, J., concurring in part and concurring in the judgment).

<sup>124</sup> *Id.* at 879–80.

<sup>125</sup> Paul Hollander, *Reflections on Communism Twenty Years After the Fall of the Berlin Wall*, CATO INSTITUTE, Nov. 2, 2009, at 22, <http://object.cato.org/sites/cato.org/files/pubs/pdf/dpa11.pdf> [<https://perma.cc/LJ9V-V8BU>].

<sup>126</sup> R.J. Rummel, How Many Did Communist Regimes Murder? (Nov. 1993) (unpublished essay), <https://www.hawaii.edu/powerkills/com.art.htm> [<https://perma.cc/6Y2Z-9MUE>].

One of the most significant, underexplored features of modern history is that communist regimes slaughtered more people than the Nazis.<sup>127</sup> Crucially, the two main communist regimes killed more people annually as a percentage of their population than the Nazis.<sup>128</sup> An underappreciated body of empirical work details the startling human cost of communism. This work includes Courtois's *The Black Book of Communism*,<sup>129</sup> Solzhenitsyn's *The Gulag Archipelago*,<sup>130</sup> Robert Conquest's acclaimed *Harvest of Sorrow*<sup>131</sup> and *The Great Terror*.<sup>132</sup> French historian Stéphane

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<sup>127</sup> R.J. RUMMEL, DEATH BY GOVERNMENT 8 tbl. 1.4 (1996); ARCHIE BROWN, THE RISE AND FALL OF COMMUNISM 149 (2009) ("Stalin, in his own country, was responsible for the imprisonment and execution of political opponents, real and imagined, on an even larger scale than Hitler in Germany."); Genovese, *supra* note 94, at 371 (historian and former communist admitting that "in a noble effort to liberate the human race from violence and oppression we [communists] broke all records for mass slaughter"); Hollander, *supra* note 125, at 12, 14 ("Public awareness of the large-scale atrocities and human rights violations in communist states is minimal, especially in comparison to awareness of the Holocaust and Nazism. . . . [T]he far greater number of victims of communist systems appears to carry less moral weight than the Holocaust, because of the mechanized quality of the Nazi mass murders."). Widely accepted estimates of the number of European Jews killed by Nazis begin at a low range of at least six million (excluding non-Jewish victims), while twice that number of innocents died from Soviet-imposed famine alone. Compare LUCY S. DAWIDOWICZ, THE WAR AGAINST THE JEWS 1933–1945, at 149 (1975) (asserting that 6 million European Jews were murdered by Nazis) and TOM SEGEV, THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST 96 (Haim Watzman trans., 1993), with ROBERT CONQUEST, THE HARVEST OF SORROW: SOVIET COLLECTIVIZATION AND THE TERROR—FAMINE 53 (1986) (documenting Soviet-engineered mass famine during the 1930s, responsible for killing up to 14 million people).

<sup>128</sup> RUMMEL, *supra* note 127, at 4 tbl. 1.2 (describing "the percent of [its] population killed . . . per year of the regime" and showing that Germany from 1933–1945 killed at an annual rate of .09%, while the USSR from 1917–1987 killed at an annual rate of .42%, and China from 1949–1987 killed at an annual rate of .12%).

<sup>129</sup> STÉPHANE COURTOIS ET AL., THE BLACK BOOK OF COMMUNISM 15 (Jonathan Murphy & Mark Kramer trans., 1999).

<sup>130</sup> ALEKSANDR I. SOLZHENITSYN, THE GULAG ARCHIPELAGO (Thomas P. Whitney trans., Harper & Row 1973).

<sup>131</sup> CONQUEST, *supra* note 127 (documenting Soviet-engineered mass famine during the 1930s that was responsible for killing up to 14 million people).

Courtois observes in *The Black Book of Communism* that communist regimes killed “approximately 100 million people in contrast to the approximately 25 million victims of the Nazis.”<sup>133</sup> “This clear record should,” as Courtois wrote, “provide at least some basis for assessing the similarity between the Nazi regime, which since 1945 has been considered the most viciously criminal regime of this century, and the Communist system, which as late as 1991 had preserved its international legitimacy unimpaired . . .”<sup>134</sup>

Communism’s death toll is not only unparalleled in absolute numbers, but in relative population percentages as well. As a percentage of their respective populations, Soviet and Chinese communist regimes slaughtered a higher percentage of people annually than the Nazis.<sup>135</sup> Yet, as sociologist Paul Hollander observes, “[T]here is a remarkable lack of moral concern in the West with the atrocities committed under communist systems,” which is a sharp contrast with the “impassioned condemnation of the outrages of Nazism.”<sup>136</sup> Communist ideology evades fair scrutiny for many reasons, not least of which is that communism “included some genuinely humanistic aspirations.”<sup>137</sup> “All power . . . belongs to the [working people] . . .,” proclaimed the 1936 Soviet Constitution.<sup>138</sup> According to the 1936 Constitution, the Soviet state was dedicated to the interests of “workers and peasants,”<sup>139</sup> and the abolition of inequality.<sup>140</sup> Mao’s commandment was “to serve the people.”<sup>141</sup>

<sup>132</sup> ROBERT CONQUEST, THE GREAT TERROR, at xvi (40th anniversary ed. 2007) (“Exact numbers may never be known with complete certainty, but the total of deaths caused by the whole range of the Soviet regime’s terrors can hardly be *lower* than some fifteen million.”).

<sup>133</sup> COURTOIS ET AL., *supra* note 129.

<sup>134</sup> *Id.*

<sup>135</sup> RUMMEL, *supra* note 127, at 4 tbl. 1.2. Cf. George Steiner, *The Forests of the Night*, NEW YORKER, June 3, 1974, at 78, 78–87 (reviewing ALEKSANDR SOLZHENITSYN, GULAG ARCHIPELAGO (1974)) (“To infer that the Soviet terror is as hideous as Hitlerism is not only a brutal simplification but a moral indecency.”).

<sup>136</sup> Hollander, *supra* note 125, at 1.

<sup>137</sup> BROWN, *supra* note 127, at 616.

<sup>138</sup> CONSTITUTION OF THE U.S.S.R. ch I, art. 3.

<sup>139</sup> *Id.* at ch. I, art. 1; Letter, F. Engels to Phil Van Patten (April 18, 1883), in KARL MARX AND FREDERICK ENGELS: SELECTED CORRESPONDENCE 340, 341 (I. Lasker trans., Progress Publishers 1955) (“[T]he proletarian class will first have to possess itself of the organized political force of the State and with this aid stamp out the resistance of the Capitalist class and re-organize society.”).

The observable consequences of these well-meaning, progressive commitments were less ideal. As many as forty-five million Chinese were killed by the egalitarian program known as the Great Leap Forward, merely in the four-year period from 1958-1962.<sup>142</sup> “[T]he highest body counts in history were achieved in the Stalinist and Maoist purges, each of which is currently estimated at having caused more than 20 million deaths” in the effort to create “a utopian society based on equality, shared wealth, and dignity for all,” observe Baumeister and Campbell.<sup>143</sup> Importantly, speech restrictions were integral to the totalitarian communist regimes.

Bloody conflict rooted in class resentment, doctrinal rigidity, and racial grievance, are not without historical parallel. “The death camps in the Soviet Gulag [and] at Treblinka . . . were grounded in class, ideology and race.”<sup>144</sup> Eugene Genovese, a prominent historian and former communist, observed that communism’s “grand liberation featured hideous political regimes under which no sane person would want to live.”<sup>145</sup>

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<sup>140</sup> See GEORGE C. GUINS, SOVIET LAW AND SOVIET SOCIETY 235 (1954) (“[T]he fight for the removal of material inequality” is at the heart of communist regimes.).

<sup>141</sup> MAO TSE-TUNG, *supra* note 71, at 5. See also CHENG, *supra* note 71, at 498.

<sup>142</sup> DIKÖTTER, *supra* note 110, at 325 (arguing that “archival evidence . . . conservatively puts the number of premature deaths at a minimum of 45 million for the great famine of 1958–62”); YANG JISHENG, TOMBSTONE: THE GREAT CHINESE FAMINE, 1958-1962, at 396 tbl. 11.1 (2013) (calculating on the basis of official published government records that almost 32.5 million died during the state-engineered famine).

<sup>143</sup> Baumeister & Campbell, *supra* note 95, at 210.

<sup>144</sup> Harry G. Hutchison, *Liberal Hegemony? School Vouchers and the Future of the Race*, 68 MO. L. REV. 559, 624 (2003).

<sup>145</sup> Genovese, *supra* note 94, at 373.

Table 1. Deaths Listed by Dictatorship<sup>146</sup>

| This Century's Bloodiest Megamurderers |          |            |         |                             |
|--|----------|------------|---------|-----------------------------|
| Dictator                               | Ideology | Country    | Years   | Murdered (000) <sup>a</sup> |
| Joseph Stalin                          | C        | USSR       | 1929-53 | 42,672 <sup>b</sup>         |
| Mao Tse-tung                           | C        | China      | 1923-76 | 37,828 <sup>c</sup>         |
| Adolf Hitler                           | F        | Germany    | 1933-45 | 20,946                      |
| Chiang Kai-shek                        | M/F      | China      | 1921-48 | 10,214 <sup>d</sup>         |
| Vladimir Illich Lenin                  | C        | USSR       | 1917-24 | 4,017 <sup>e</sup>          |
| Tojo Hideki                            | M/F      | Japan      | 1941-45 | 3,990 <sup>f</sup>          |
| Pol Pot                                | C        | Cambodia   | 1968-87 | 2,397 <sup>c</sup>          |
| Yahya Khan                             | M        | Pakistan   | 1971    | 1,500                       |
| Josip Broz Tito                        | C        | Yugoslavia | 1941-87 | 1,172 <sup>c</sup>          |

Key: C = communist; F = fascist; M/F = militarist/fascist; M = militarist

a These are the most probable estimates from a low to high range. Estimates are from or based on Rummel 1990, 1991, 1992 and *Statistics of Democide*.

b Citizens only.

c Includes his guerrilla period.

d Includes his warlord period.

e Includes one-third the democide for the NEP period 1923-28.

f Estimated as one-half the 1937-45 democide in China plus the World War II democide.

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<sup>146</sup> RUMMEL, *supra* note 127, at 8 tbl. 1.4.

Table 2. Annual Rate of Murders per Population<sup>147</sup>

| Regimes                     | Years   | Twentieth-Century Democide |          |          | Annual Rate (%) |
|-----------------------------|---------|----------------------------|----------|----------|-----------------|
|                             |         | Total                      | Domestic | Genocide |                 |
| <b>Megamurderers</b>        | 1900-87 | 151,491                    | 116,380  | 33,476   | .92             |
| <b>Dekamegamurderers</b>    | 1900-87 | 128,168                    | 100,842  | 26,690   | .18             |
| USSR                        | 1917-87 | 61,911                     | 54,769   | 10,000   | .42             |
| China (PRC)                 | 1949-87 | 35,236                     | 35,236   | 375      | .12             |
| Germany                     | 1933-45 | 20,946                     | 762      | 16,315   | .09             |
| China (KMT)                 | 1928-49 | 10,075                     | 10,075   | Nil      | .07             |
| <b>Lesser Megamurderers</b> | 1900-87 | 19,178                     | 12,237   | 6,184    | 1.63            |
| Japan                       | 1936-45 | 5,964                      | nil      | nil      | nil             |
| China (Mao Soviets)         | 1923-49 | 3,466                      | 3,466    | nil      | .05             |
| Cambodia                    | 1975-79 | 2,035                      | 2,000    | 541      | 8.16            |
| Turkey                      | 1909-18 | 1,883                      | 1,752    | 1,883    | .96             |
| Vietnam                     | 1945-87 | 1,678                      | 944      | nil      | .10             |
| Poland                      | 1945-48 | 1,585                      | 1,585    | 1,585    | 1.99            |
| Pakistan                    | 1958-87 | 1,503                      | 1,503    | 1,500    | .06             |
| Yugoslavia (Tito)           | 1944-87 | 1,072                      | 987      | 675      | .12             |

After World War II, while drafting the Genocide Convention, the United Nations set out to enumerate which groups would be protected under the Convention.<sup>148</sup> The Soviet Union successfully excluded the category of “political groups” from the list of protected groups.<sup>149</sup> “Particularly vehement in opposing the category [of political groups] was the Soviet Union, which had liquidated ‘enemy classes’ on political grounds in the 1930s, and presumably did not want to have that liquidation labeled genocide,” according to David Luban.<sup>150</sup> Successful Soviet lobbying is all that prevented specific communist regimes from being labeled genocidal.

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<sup>147</sup> *Id.* at 4 tbl. 1.2.

<sup>148</sup> *Treaties, States Parties and Commentaries: Convention on the Prevention and Punishment of the Crime of Genocide*, INT'L COMMITTEE OF THE RED CROSS, <https://ihl-databases.icrc.org/ihl/INTRO/357?OpenDocument> [<https://perma.cc/J24P-HL2E>].

<sup>149</sup> Orie L. Phillips & Eberhard P. Deutsch, *Pitfalls of the Genocide Convention*, 56 A.B.A. J. 641, 643 (1970).

<sup>150</sup> David Luban, *Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report*, 7 CHI. J. INT'L L. 303, 317 (2006).

Communist regimes and other governments slaughtered so many people that political scientist Rudolph Rummel coined a new term to encompass the magnitude and uniqueness of the human toll: “democide.”<sup>151</sup> Democide is defined as “genocide, politicide, massacres, extrajudicial executions, and other forms of mass murder” committed “by state and quasi-state regimes” against the population.<sup>152</sup> In the twentieth century, far more people were killed by their own governments in violence “*aside from warfare*” than were killed in warfare between nations.<sup>153</sup> Communists hold the heaviest hand in those death figures, as Rummel quantified the matter.<sup>154</sup>

While unrivaled bloodshed was the most heartbreakingly final injustice of the communist regimes, communism was also fatal to freedom of speech. The imposition of equality required severe degrees of arbitrary force and social control. To achieve the degree of social control necessitated by the goal of strict equality, communism implicitly demanded either limitations on speech or repression of dissenters. Communist regimes did both at various times.

#### *A. Law and Censorship in the Soviet Union*

Totalitarianism, “[i]n its Communist form,” as political scientist Richard Lowenthal described it, “developed into a full-blown secular religion, complete with its own sacred history, by Karl Marx.”<sup>155</sup> “[O]nce the work of political rule had begun for Lenin in Russia,” writes philosophy professor Robert Nisbet, it was “easy for him to see the terror he had ordered as nothing but the manifestation of freedom and justice.”<sup>156</sup> Poet and Nobel Prize winner Czeslaw Milosz described the Soviet leadership: “These persons, no matter how capable they are of murdering millions of people in the name of Communism,” have seemingly admirable personal qualities.<sup>157</sup> “Their capacity to sympathize and help is almost unlimited. Indeed this very feeling of compassion pushed them onto the

<sup>151</sup> RUDOLPH J. RUMMEL, STATISTICS OF DEMOCIDE, at vi (1998).

<sup>152</sup> *Id.*

<sup>153</sup> RUMMEL, *supra* note 127, at 3 (emphasis added).

<sup>154</sup> *Id.* at 5 fig. 1.1.

<sup>155</sup> Richard Lowenthal, *Beyond Totalitarianism?*, in 1984 REVISITED: TOTALITARIANISM IN OUR CENTURY 209, 264 (Irving Howe ed., 1983).

<sup>156</sup> Robert Nisbet, *1984 and the Conservative Imagination*, in 1984 REVISITED: TOTALITARIANISM IN OUR CENTURY, *supra* note 155, at 180, 202.

<sup>157</sup> Czeslaw Milosz, THE CAPTIVE MIND 77 (Jane Zielonko trans., 1990).

road of revolution . . .”<sup>158</sup> Milosz was a member of the socialist resistance against Nazi occupation, but he would later flee Soviet rule.<sup>159</sup> To promote their progressive creed of equality, Soviet leaders relegated every other value and interest to secondary status, including human life and the rule of law.<sup>160</sup>

Marx and Engels postulated that the law’s “essential character and direction are determined by the economical conditions of existence of” the ruling class.<sup>161</sup> Building on that doctrine, Lenin asserted, “A law is a political instrument; it is politics.”<sup>162</sup> Lenin’s totalitarianism grew from the conceptual foundation laid by Marx and Engels, who viewed the law as an instrument of ruling class domination, crafted in the interests of the ruling class.<sup>163</sup> Lenin’s dictate that law is politics applied to Soviet law broadly.<sup>164</sup>

In the Soviet Union, the criminal law was imminently progressive.<sup>165</sup> During the Khrushchev era, the goal of criminal law was “the protection of

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at viii, xii (“My experiences in those years led me to the conclusion that, after the defeat of Hitler, only men true to a socialist program would be capable of abolishing the injustices of the past, and rebuilding the economy of the countries of Central and Eastern Europe.”).

<sup>160</sup> See generally *id.*

<sup>161</sup> KARL MARX & FRIEDRICH ENGELS, *Manifesto of the Communist Party*, in THE MARX-ENGELS READER 469, 487 (R. Tucker ed., 2d ed. 1978) (1848).

<sup>162</sup> JOHN N. HAZARD, COMMUNISTS AND THEIR LAW 69 (1969).

<sup>163</sup> *Id.* at 70. Cf. W.R. Newell, *Reflections on Marxism and America*, in CONFRONTING THE CONSTITUTION 334, 336–39 (Allan Bloom ed., 1990) (“[T]he Soviet version of Marxism has never been a faithful reflection of Marx’s real doctrine.”).

Marxist theorists understandably wish to distance Marxism from the Soviet regime, and from most other communist regimes. However, Marx grossly neglected to anticipate an obvious problem: Marx had “little to say about . . . the dangers of tyranny inherent in a party presuming to exercise dictatorial power after the revolution.” *Id.* at 339. For making ahistorical and utopian assumptions about psychology and society, Marx can be charged with recklessly promoting revolution and one-party dictatorship while failing to safeguard freedoms and rights. When a doctrine is continually applied in different national and cultural settings, and the consequences are consistently similar, it is more than fair to ask why the doctrine functions so predictably—why the trees all seem to bear the same rotten fruit.

<sup>164</sup> See HAZARD, *supra* note 162.

<sup>165</sup> See *id.*

the Soviet order, socialist property, the character and rights of citizens and the entire social law and order.”<sup>166</sup> For the Soviets, the aim of punishment was “to reform and re-educate the convicted offender in the spirit of honest attitude towards work, verbatim adherence to laws and respect of the rules of the socialist way of life.”<sup>167</sup> This conception of law and society directly impacted free expression and open dialogue.

Soviet censorship made free expression subservient to ideology—an inversion of values made possible by the progressive Marxist-Leninist notion that law is politics. The Soviet Constitution of 1936 actually “guaranteed” the “[f]reedom of speech,” along with the freedoms of press and assembly.<sup>168</sup> Article 125 of the 1936 Soviet Constitution declares, “In conformity with the interests of the toilers, and in order to strengthen the socialist system, the citizens of the U.S.S.R. are guaranteed by law: (a) freedom of speech . . .”<sup>169</sup> Brown observes that “[n]ot one of these freedoms existed in reality, and admirers of Stalin’s constitution and the supposed bestowal of such freedoms missed the qualification in the introduction to the article.”<sup>170</sup> That significant qualification was the condition that freedom of speech is to be interpreted “[i]n conformity with the interests of the toilers” and “to strengthen the socialist system.”<sup>171</sup> Thus, freedom of speech was required to conform to narrowly conceived, class-based interests defined by Soviet doctrine. It requires no imagination to understand how such a condition could easily circumscribe the entire freedom. Brown points out the absurdity of free speech conditioned upon ideological doctrine:

Should anyone wish to assert those freedoms, who would decide whether they were in conformity “with the interests of the toilers” or whether their actions were designed “to strengthen the socialist system”? The answer, of course, was the Communist Party leadership and the political police who did Stalin’s bidding.<sup>172</sup>

<sup>166</sup> Jaan Sootak, *Theories of Punishment and Reform of Criminal Law*, 5 JURIDICA INT’L 68, 72 (2000).

<sup>167</sup> *Id.*

<sup>168</sup> CONSTITUTION OF THE U.S.S.R. ch. X, art. 125.

<sup>169</sup> *Id.*

<sup>170</sup> BROWN, *supra* note 127, at 74.

<sup>171</sup> CONSTITUTION OF THE U.S.S.R. ch. X, art. 125.

<sup>172</sup> BROWN, *supra* note 127, at 74.

“Each fundamental right in the Soviet Constitution is subject to the significant condition that it not interfere with the building of communism,” described one observer of the Soviet legal system.<sup>173</sup>

Soviet censorship also operated in a more subtle and insidious manner by quite often chilling speech instead of simply crushing it. “Newspapers, journals and books were subject to an official censorship . . . But most of the censorship was done by editors and authors themselves.”<sup>174</sup> To Leszek Kolakowski, Marxism and Stalinism nearly achieved the political “triumph” of “an ideal totalitarian society.”<sup>175</sup> According to Kolakowski, the triumph of Stalinism “consisted not simply in that virtually everything [in the Soviet Union] was either falsified or suppressed—statistics, historical events, current events, names, maps, books (occasionally Lenin’s texts)—but that the inhabitants of the country were trained to know what [was] politically ‘correct.’”<sup>176</sup> As Brown explains, authors “knew the limits of the possible . . . and self-censored their work accordingly.”<sup>177</sup> Victor Serge observed of Stalin’s Russia:

I have seen the intellectuals of the Left, responsible for editing reputable reviews and journals, refuse to publish the truth, even though it was absolutely certain, even though they did not contest it; but they found it painful, they preferred to ignore it, it was in contradiction with their moral and material interests (the two generally go together).<sup>178</sup>

The regime of official censorship and widespread self-censorship worked in tandem with the Soviet educational system to produce extreme doctrinal rigidity.<sup>179</sup> Within “the Soviet general educational system,” there were “compulsory courses in Communist Party history and Marxist-

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<sup>173</sup> Thomas E. Towe, *Fundamental Rights in the Soviet Union: A Comparative Approach*, 115 U. PA. L. REV. 1251, 1267 (1967).

<sup>174</sup> BROWN, *supra* note 127, at 575.

<sup>175</sup> Leszek Kolakowski, *Totalitarianism and the Virtue of the Lie*, in 1984 REVISITED: TOTALITARIANISM IN OUR CENTURY, *supra* note 155, at 122, 129.

<sup>176</sup> *Id.*

<sup>177</sup> BROWN, *supra* note 127, at 575.

<sup>178</sup> SERGE, *supra* note 17, at 376.

<sup>179</sup> See also Nigel Grant, Book Review, 12 COMP. EDUC. REV. 361, 361 (1968) (reviewing ELLEN PROPPER MICKIEWICZ, SOVIET POLITICAL SCHOOLS: THE COMMUNIST PARTY ADULT INSTRUCTION SYSTEM (1967)).

Leninist philosophy in universities and colleges.”<sup>180</sup> The Soviets also ensured “the injection of political attitudes and values into other subjects in the ordinary schools.”<sup>181</sup> A vibrant state educational system had the planned effect of thorough indoctrination.<sup>182</sup> “The son of a worker, subjected to such an education, cannot think otherwise than as the school demands,” and “[t]he greater the number of people who . . . pass through the schools,” unsurprisingly, “the further the doctrine reaches.”<sup>183</sup> To illustrate the full force of indoctrination at its apex, Milosz quotes a Polish poet, who admitted, “I can’t write as I would like to.”<sup>184</sup> The young poet said:

My own stream of thought has so many tributaries, that I barely succeed in damming off one, when a second, third, or fourth overflows. I get halfway through a phrase, and already I submit it to Marxist criticism. I imagine what X or Y will say about it, and I change the ending.<sup>185</sup>

For those who did not internalize and conform to the reigning doctrine, stricter measures were available. Stalinism was dedicated to “unmasking” campaigns designed to enforce ideological purity within communist ranks through ritual denunciation of dissidents.<sup>186</sup> Nadezhda Mandelstam wrote of the mental and moral effect of Stalinism on Russian society: “Everything we have seen in our times—the dispossession of the kulaks, class warfare, the constant ‘unmasking’ of people, the search for an ulterior motive behind every action—all this has taught us to be anything you like except kind.”<sup>187</sup> Mandelstam’s description of “the search for an ulterior motive behind every action” could easily apply to today’s Marxist scholarly criticism, with its rigid insistence on constantly emphasizing the worst elements of American history.<sup>188</sup> Mandelstam’s lament also applies to the

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *See id.*

<sup>183</sup> MILOSZ, *supra* note 157, at 201–02.

<sup>184</sup> *Id.* at 14.

<sup>185</sup> *Id.* at 14–15.

<sup>186</sup> J. ARCH GETTY, *ORIGINS OF THE GREAT PURGES* 88–89 (1985) (discussing “unmasking” efforts).

<sup>187</sup> NADEZHDA MANDELSTAM, *HOPE AGAINST HOPE* 134 (Max Hayward trans., 1983).

<sup>188</sup> See Sam Wineburg, *Undue Certainty: Where Howard Zinn’s A People’s History Falls Short*, AM. EDUCATOR, Winter 2012–2013, at 27, 33, <http://news.stanford.edu/news/> (*continued*)

pretense that only the left is capable of elucidating the underlying forces shaping society.<sup>189</sup> Of particular import for free speech today, the Marxist-Leninist notion that law is politics is taken as an article of faith by critical legal studies.<sup>190</sup>

### B. Law and Censorship in China

While Stalin leads the list of the twentieth century's mass murderers, "[i]t may come as a surprise to find Mao Tse-tung next in line as [the twentieth] century's greatest murderer, but this would only be because the full extent of communist killing in China under his leadership has not been widely known in the West."<sup>191</sup> Frank Dikötter concludes that approximately 2.5 million Chinese were executed, beaten to death, or tortured to death from 1958-1962 alone, as a result of the Great Leap Forward.<sup>192</sup> As Ian Baruma notes, "[T]he Chinese government admits that more than fifteen million people died of starvation as the direct result of Mao's deranged experiments in the late 1950s."<sup>193</sup> Socialist and Sinologist Pierre Ryckmans wrote, "Those who harbor a certain nostalgia for totalitarianism . . . will find in Maoist China the incarnation of a medieval dream, where institutionalized Truth has again a strong secular arm to impose dogma, stifle heresy, and uproot immorality."<sup>194</sup>

The early Chinese communists adhered to the progressive dictate that law is politics. Under Chinese communism, "law is seen as an important agent of political socialization and mobilization to inculcate the people

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2012/december/wineburg-historiography-zinn-122012.html [<https://perma.cc/FQY8-W7B4>] (historian critically paraphrasing Zinn's influential polemic: "Our heroes are shameless frauds, our parents and teachers conniving liars, our textbooks propagandistic slop.").

<sup>189</sup> See THOMAS SOWELL, THE VISION OF THE ANOINTED 3 (1995) ("[T]hose who disagree with the prevailing [leftist] vision are seen as being not merely in error, but in sin.").

<sup>190</sup> Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1516-17 (1991) (noting "the proposition common to most [critical legal studies] authors that law is politics").

<sup>191</sup> RUMMEL, *supra* note 127, at 8.

<sup>192</sup> DIKÖTTER, *supra* note 110, at xi.

<sup>193</sup> Ian Buruma, *The Man Who Got it Right*, N.Y. REV. OF BOOKS (Aug. 15, 2013) (reviewing SIMON LEYS, THE HALL OF USELESSNESS (2013)), <http://www.nybooks.com/articles/2013/08/15/simon-leys-man-who-got-it-right/> [<https://perma.cc/MEH4-BQM7>].

<sup>194</sup> LEYS, *supra* note 113, at 34-35.

with the new socialist morality.”<sup>195</sup> Equal justice was disregarded in favor of a class-based justice system.<sup>196</sup> Those categorized as “the people” were dealt with using the “method of democracy.”<sup>197</sup> Those categorized as “enemies” were dealt with using the “method of dictatorship.”<sup>198</sup> The “enemies” included “reactionaries” and “capitalists.”<sup>199</sup> This class-based system was at one time “a most frequently cited guideline for law enforcement in China.”<sup>200</sup>

Yet, even when Maoism was at the peak of its influence, the state was not the preferred method for imposing orthodoxy.<sup>201</sup> Self-censorship and voluntary compliance were much preferred because self-censorship and voluntary compliance demonstrated that the subject was not even resisting.<sup>202</sup> To that end, indoctrination was optimal. Shao-Chuan Leng, an authority on Chinese law and politics, described how indoctrination and censorship interact: “The proper modes of conduct based on the collective ethics of an egalitarian society are communicated to the people through education . . . . The formal sanctioning process of the state comes into play only in serious cases of deviance” from Maoist orthodoxy.<sup>203</sup> Under Chinese communism, every academic discipline was reduced to an ideological tool.<sup>204</sup> “Philosophy exists only as a function of the class struggle,” according to the authoritative, official Chinese text *Ou-chou che-hsüeh shih chien-lüeh (A Short History of European Philosophy)*.<sup>205</sup> Thus, the chilling effect of self-censorship was widespread, as indoctrination constrained the individual within the proper bounds. A friend of Nien Cheng’s, suffering under communist rule, remarked, “When the penalty for speaking one’s mind is so great, nobody knows what anybody else thinks.”<sup>206</sup>

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<sup>195</sup> Shao-Chuan Leng, *The Role of Law in the People’s Republic of China as Reflecting Mao Tse-Tung’s Influence*, 68 J. CRIM. L. & CRIMINOLOGY 356, 366 (1977).

<sup>196</sup> *Id.* at 363.

<sup>197</sup> *Id.* at 364.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 357.

<sup>202</sup> *See id.*

<sup>203</sup> *Id.*

<sup>204</sup> *See id.*

<sup>205</sup> LEYS, *supra* note 113, at 110–11.

<sup>206</sup> CHENG, *supra* note 71, at 55.

A general word about the broader culture under Chinese communism is warranted here. Americans familiar with any variant of “critical theory” will immediately recognize the pattern of cultural destruction manifested by the Cultural Revolution in China from 1966–1976.<sup>207</sup> As Ley writes, “[T]he master slogan of the Cultural Revolution [was], ‘Destroy the old to establish the new.’”<sup>208</sup> The hammer blows that demolished tenth century Buddhist sculptures<sup>209</sup>—acts that seemed so utterly nihilistic—were an expression of the dogmatic communist desire to destroy traditions.

Unfortunately, in the rush to eliminate tradition, those who destroy a culture may be left with no culture at all. Ryckmans (pen name “Simon Leys”) wrote, “[T]he main effect of the Cultural Revolution has been to dry up and seal all the springs of culture, in all fields . . .”<sup>210</sup>

The Cultural Revolution brought all cultural activity in China to a standstill that lasted for several years. Schools were closed, intellectuals were dismissed, pilloried, and deported to the countryside. All scientific, artistic, literary, and cultural periodicals ceased publication.<sup>211</sup>

Ryckmans describes a destructive impulse that is not limited to one nation, one group, or one phase of history.<sup>212</sup> Instead, during the Cultural Revolution, China faced a political movement determined to destroy the nation’s heritage in order to usher in what was thought to be a more enlightened era.<sup>213</sup> The actual consequence was chaos and suffering.<sup>214</sup> “The Cultural Revolution had been hard on Chinese nerves—the years of unremitting tension, battle, uncertainty, and violence . . .”<sup>215</sup>

Communism was a rigid model for society as a whole, not only the economy. In fact, communist rule was marked by the total control by communist ideology over every facet of life, including the cultural

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<sup>207</sup> This school of thought, and its numerous offshoots, will be discussed further in Part IV below.

<sup>208</sup> LEYS, *supra* note 113, at 57.

<sup>209</sup> *Id.* at 99.

<sup>210</sup> *Id.* at 103.

<sup>211</sup> *Id.* at 132.

<sup>212</sup> *Id.* at 131.

<sup>213</sup> See *id.* at 30.

<sup>214</sup> See *id.* at 129.

<sup>215</sup> *Id.* at 37.

sphere.<sup>216</sup> An assertive egalitarian ideology pressured Chinese culture in the direction of further stifling intellectual inquiry and rigidly confining the parameters of thought and speech.<sup>217</sup> The Chinese experience serves as a warning: one man's Cultural Revolution may be another man's cultural destruction; one man's liberation may be another man's tragedy—to borrow a title from one of Dikötter's works.<sup>218</sup> There is reason to be skeptical of demands to replace traditions with ill-conceived notions of progress—especially when the mirage of progress entails restrictions on free expression.

In the history of communist societies, we see the bitter fruit of group grievances, a widespread sense of victimhood, and the desire to impose doctrine, to persecute opposing viewpoints, and to empower a censorious state. Ryckmans memorably describes his efforts to seek facts through the obfuscation of a Chinese communist bureaucracy.<sup>219</sup> Ryckmans found that valuable discoveries may arise by scrutinizing silence.<sup>220</sup> “In the end, one learns most from the repetition of certain silences, the recurrence of a certain reticence about several points.”<sup>221</sup> The history of communism, as it has been recorded in the West, is marred by repetitious silence. The murderous record of communism is largely obscured by ideological reticence to critically discuss communism's tragic toll. With the preceding history in mind, we may begin to better understand the image of communism in the public mind today. Part IV will describe how intellectuals on the left rationalized and minimized the misdeeds of communism, creating an analytical silence that ultimately protects hate speech regulation from scrutiny.

#### IV. COMMUNISM IN THE PUBLIC MIND

Our inability to recognize the threat of censorship is a symptom of our inability to recognize the magnitude of communism's crimes. Anne Applebaum, author of the grim, magisterial work *The Gulag*, writes:

The Cold War produced James Bond and thrillers, and cartoon Russians of the sort who appear in Rambo films,

<sup>216</sup> See *id.* at 132–33.

<sup>217</sup> See *id.*

<sup>218</sup> FRANK DIKÖTTER, THE TRAGEDY OF LIBERATION: A HISTORY OF THE CHINESE REVOLUTION 1945–1957 (2013).

<sup>219</sup> LEYS, *supra* note 113, at 145–46.

<sup>220</sup> *Id.* at 145.

<sup>221</sup> *Id.*

but nothing as ambitious as *Schindler's List* or *Sophie's Choice*. Steven Spielberg, probably Hollywood's leading director (like it or not) has chosen to make films about Japanese concentration camps (*Empire of the Sun*) and Nazi concentration camps, but not about Stalinist concentration camps. The latter haven't caught Hollywood's imagination in the same way.<sup>222</sup>

"Public awareness of the large-scale atrocities and human rights violations in communist states is minimal," Hollander writes, "especially in comparison to awareness of the Holocaust and Nazism."<sup>223</sup> Rummel, writing of the Communist gulag, notes that over the course of "70 years it likely chewed up almost 40 million lives, well over twice as many as probably died in some 400 years of the African slave trade, from capture to sale in an Arab, Oriental, or New World market."<sup>224</sup> Why is communism not strongly associated, in the public mind, with death and injustice? The influence of ideology takes us far towards an explanation.

During the 1920s, idealistic revolutionary Victor Serge wrote, "[T]he majesty of the Russian Revolution disarmed its supporters of all critical sense . . ."<sup>225</sup> In reality, within Russia, "any free (i.e., critical) expression of opinion became dangerous and consequently had to be treated as enemy activity."<sup>226</sup> Yet, in the 1930s, one could read "glowing reports of a new Soviet society from the pens of prominent British writers and educators, which flooded British universities" at the time.<sup>227</sup> Nonetheless, in 1933 Serge would observe, "No real intellectual inquiry is permitted in any sphere. . . . Fear of heresy, based on self-interest, leads to dogmatism and bigotry of a peculiarly paralysing [sic] kind."<sup>228</sup> At the Soviet show trials, "the succession of executions went on into thousands, without trials of any sort. And in every country of the civilized world, learned and 'progressive' jurists were to be found who thought these proceedings to be correct and convincing."<sup>229</sup> Cheng describes the Western journalists reporting on the Chinese Communist Party before 1949, when the

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<sup>222</sup> ANNE APPLEBAUM, GULAG, at xviii (Doubleday 2003).

<sup>223</sup> Hollander, *supra* note 125, at 12.

<sup>224</sup> RUMMEL, *supra* note 127, at 9.

<sup>225</sup> SERGE, *supra* note 17, at 138.

<sup>226</sup> *Id.* at 118.

<sup>227</sup> CHENG, *supra* note 71, at 49.

<sup>228</sup> SERGE, *supra* note 17, at 283.

<sup>229</sup> *Id.* at 332.

Communist Party took over all of China.<sup>230</sup> Of those Western journalists, Cheng writes, “Most of these men were liberal idealists. They were impressed by the austerity, discipline, and singleness of purpose of the Communist leaders, but they did not have a deep understanding of either the character of these men or the philosophy that motivated them.”<sup>231</sup>

Brown describes the West’s intentional blindness towards the crimes of Communism in the immediate postwar era:

Stalin, in his own country, was responsible for the imprisonment and execution of political opponents, real and imagined, on an even larger scale than Hitler in Germany, but all this was, for the time being, overlooked. Soviet secrecy and censorship, combined with the suspension of critical faculties on the part of many Westerners who provided rosy accounts of Stalin’s USSR, meant that such facts were not nearly as widely known as they should have been.<sup>232</sup>

Even amongst Russian revolutionaries, “Nobody was willing to see evil in the proportions it had reached,” Serge wrote, while “[e]very week the system devoured a new class of victim.”<sup>233</sup> In the early twentieth century, intellectuals openly embraced Marxism.<sup>234</sup> Influential author and educator Max Lerner, writing in 1938, confidently asserted that Marxism “is still, for all its shortcomings, the most useful and illuminating body of social thought in our world.”<sup>235</sup> When Khrushchev gave his famous 1956 speech admitting some of Stalin’s crimes—yet only the crimes against communists—the progressive faith was shaken.<sup>236</sup> Later, as the crimes of Chinese communism came to the fore, it should have been even more difficult to maintain uncritical admiration for the communist system. Yet, old faiths are not easily abandoned, and some Western intellectuals reacted

<sup>230</sup> CHENG, *supra* note 71, at 23–24.

<sup>231</sup> *Id.*

<sup>232</sup> BROWN, *supra* note 127, at 149.

<sup>233</sup> SERGE, *supra* note 17, at 245, 276.

<sup>234</sup> See, e.g., MAX LERNER, IT IS LATER THAN YOU THINK 72 (1939).

<sup>235</sup> *Id.*

<sup>236</sup> See John Rettie, *The Secret Speech that Changed World History*, GUARDIAN (Feb. 25, 2006), <https://www.theguardian.com/world/2006/feb/26/russia.theobserver> [<https://perm.a.cc/JRH5-29EB>].

to the news of communist crimes with a wave of vituperative denial.<sup>237</sup> Few academics provided a rigorous critique of the egalitarian experiments. Eugene Genovese, a historian and self-proclaimed former “Communist,” announced that communists “broke all records for mass slaughter” yet “[s]cholars in our own ranks have shown precious little interest in reflecting seriously on the collapse of the socialist countries we supported to the bitter end . . .”<sup>238</sup> For Western intellectuals, the collapse of the Soviet Union “called into question their deeper, prior commitments and convictions and offered an opportunity for some political and ideological soul-searching. But few undertook such soul searching,” Hollander laments.<sup>239</sup>

Sinologist Pierre Ryckmans, a socialist himself, was an early critic of Western leftists’ infatuation with Chinese communism.<sup>240</sup> “Swimming against the tide of intellectual opinion in the West, which tended to see Mao as an admirable champion of the ordinary Chinese worker, Mr. Ryckmans described . . . repression, famines and the terrorising of a nation.”<sup>241</sup> The West only gradually took to heart the enormity of communism’s toll.<sup>242</sup> With the dissolution of the Soviet Union, mainstream academic commentary would occasionally reflect that—in the public mind—communism’s reputation had declined.<sup>243</sup> Following World

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<sup>237</sup> Compare BAO RUO-WANG & RUDOLPH CHELMINSKI, PRISONER OF MAO 7 (1976) (groundbreaking early autobiography of prisoner who survived Chinese labor camp), with Seth Faison, *Jean Pasqualini Dies at 71; Told of China's Penal Horrors*, N.Y. TIMES (Oct. 13, 1997), <http://www.nytimes.com/1997/10/13/world/jean-pasqualini-dies-at-71-told-of-china-s-penal-horrors.html> [<https://perma.cc/MED3-MT36>] (“When the book was published in France in 1973, Mr. Pasqualini was denounced by many French supporters of China's revolution who refused to believe that the seemingly utopian nation of happy peasants and workers, as they then saw it, could have such a dark side.”).

<sup>238</sup> Genovese, *supra* note 94, at 371 (“[A]t the age of fifteen I became a Communist, and, although expelled from the party in 1950 at age twenty, I remained a supporter of the international movement and of the Soviet Union until there was nothing left to support.”).

<sup>239</sup> Hollander, *supra* note 125, at 17.

<sup>240</sup> *Pierre Ryckmans Obituary*, *supra* note 113.

<sup>241</sup> *Id.*

<sup>242</sup> See RUMMEL, *supra* note 127, at 24.

<sup>243</sup> See *id.* at 24–26.

War II, the West gradually became aware of some of Stalin's crimes.<sup>244</sup> As of 1991, one standard text would record, "Instead of connoting community sharing and happy cooperation, the word [communism] suggests terrorism, gulags, and Soviet activities designed to embarrass or damage the Western world."<sup>245</sup>

Yet, ideologically biased academics continue to influence the image of communism in the public mind. Instead of invoking a mountain of skeletons, discussion of communism quite often oddly invokes Republican Senator Joseph McCarthy, a supposed villain. Through a bizarre inversion of emphasis, the flaws of American anti-communism are brought into the forefront of historical memory while communism itself is pushed into the background. Senator McCarthy's conduct is "harshly judged by most historians and derided in the popular culture."<sup>246</sup> Right-wing persecution of the communist "movement is regularly invoked as an object lesson in the erosion of civil liberties."<sup>247</sup> However, historians are in the aggregate a lock-step liberal profession.<sup>248</sup>

This ideological conformity must necessarily influence scholarship. "[T]he field of McCarthy studies and related Cold War history was left mostly to his political foes, dominant in intellectual circles when he lived and virtually unchallenged in academic and media precincts since,"

<sup>244</sup> *Id.* at 24 ("[T]hat Stalin murdered tens of millions is becoming generally appreciated; but that Stalin, Lenin, and their successors murdered almost 62 million Soviet citizens and foreigners is little comprehended outside of the Soviet Union . . .").

<sup>245</sup> JAMES R. OZINGA, COMMUNISM 1 (2d ed. 1991).

<sup>246</sup> JOHN EARL HAYNES, HARVEY KLEHR, & ALEXANDER VASSILIEV, SPIES: THE RISE AND FALL OF THE KGB IN AMERICA, at xv (Philip Redko & Steven Shabad trans., 2009). Vassiliev is a former KGB agent who, from 1994–96, had partial access to KGB archives. *Id.* at xi. Haynes and Klehr were the first U.S. historians to access Communist International and CPUSA records in Moscow following the dissolution of the Soviet Union. *Id.*

<sup>247</sup> *Id.* at 548.

<sup>248</sup> See Stanley Rothman, S. Robert Lichter & Neil Nevitte, *Politics and Professional Advancement Among College Faculty*, 3 FORUM 1, 6 tbl.2 (2005) (national survey of faculty members found that 77% of history professors surveyed identified as liberal while 10% identified as conservative); Christopher F. Cardiff & Daniel B. Klein, *Faculty Partisan Affiliations in All Disciplines: A Voter-Registration Study*, 17 CRITICAL REV. 237, 246 tbl.4 (2005) (surveying the political affiliations of tenured faculty at eleven California universities and finding that, among history professors, there was a Democrat:Republican ratio of 10.9:1).

concludes M. Stanton Evans, in his revision of the McCarthy era.<sup>249</sup> Quite predictably, leftist scholars crafted a cartoonish historical image of Senator McCarthy and distorted the conflict with communism. However, John E. Haynes, Harvey Klehr, and Alexander Vassiliev, relying on previously unseen and newly-released KGB archives, challenge simplistic condemnations of anti-communism.<sup>250</sup> “The evidence is that Soviet espionage in the United States changed history. The espionage-enabled rapid acquisition of the atomic bomb emboldened Stalin’s policies in the early Cold War and contributed to his decision to authorize North Korea’s invasion of South Korea.”<sup>251</sup> Haynes, Klehr, and Vassiliev conclude with an assessment that should give pause to those who reflexively criticize American anti-communism:

It was no witch hunt that led American counterintelligence officials to investigate government employees and others with access to sensitive information for Communist ties after they became cognizant of the extent of Soviet espionage and the crucial role played in it by the [Communist Party USA], but a rational response to the extent to which the Communist Party had become an appendage of Soviet intelligence.<sup>252</sup>

Part of the reason for the West’s reluctance to recognize the horrors of communism is that the contradiction between ideal and reality is difficult to reconcile, especially when that contradiction calls into questions one’s own cherished principles. This is true for people of all ideological stripes and faiths, but the exposure of egalitarian ideals was especially grisly.<sup>253</sup>

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<sup>249</sup> M. STANTON EVANS, BLACKLISTED BY HISTORY: THE UNTOLD STORY OF SENATOR JOE McCARTHY AND HIS FIGHT AGAINST AMERICA’S ENEMIES 600–01 (2007) (“The views of his opponents are thus presented as the ‘facts,’ while significant data to the contrary have been denied, distorted, and in many cases suppressed entirely.”).

<sup>250</sup> HAYNES, KLEHR, & VASSILIEV, *supra* note 246, at xv.

<sup>251</sup> *Id.* at 545. For American service members, “Soviet espionage also led to the loss of America’s ability to read Soviet military communications and ensured that the Korean invasion was a surprise for which American forces were unprepared.” *Id.*

<sup>252</sup> *Id.* at 548.

<sup>253</sup> See John Barber, *Stalin’s Purges*, 7 LONDON REV. BOOKS 3 (1985) (reviewing J. ARCH GETTY, ORIGINS OF THE GREAT PURGES: THE SOVIET COMMUNIST PARTY RECONSIDERED 1933–1938 (1985), and MOSHE LEWIN, THE MAKING OF THE SOVIET SYSTEM: ESSAYS IN THE SOCIAL HISTORY OF INTERWAR RUSSIA (1985)).

“Nothing in the history of modern revolution illustrates so vividly the contrast between the ideals of a revolution’s makers and the catastrophes it may be fated to endure as do the Great Purges of 1937–1938 in the USSR.”<sup>254</sup> The academics and progressives who uncritically touted the communist innovation were forced to confront the contrast between ideal and reality. It is a dismal tribute to the insularity of the modern academy that, to this day, in humanities and social sciences departments, socialism and communism are often given a favorable hearing.<sup>255</sup> “Few colleges or universities offer courses about the former or remaining communist systems, let alone their massive human rights violations,” nor has there been “a serious or lasting moral or philosophical reassessment of the nature of communism comparable to the massive moral reflections stimulated by Nazism and its well-known evils,” Paul Hollander comments.<sup>256</sup> Indeed, “the prevalence on campus of a nostalgically sentimental view of Marxism in general” is an established fact.<sup>257</sup> The result is silence where there should be a robust discussion of the carnage produced by communist regimes, for whose rule censorship was integral.

#### *A. The Role of Academic Bias in Shaping Views of Communism*

The reason for the silence surrounding communism’s bloody past is straightforward: many academics are themselves favorably disposed to the aims, and some key institutional means, of communism. Hollander observes, “The long association of idealism with animosity toward commerce and capitalism among Western intellectuals has contributed to a reluctance to criticize [communism].”<sup>258</sup> Communist societies “were seen as striving to realize the ideals of Marx and Engels, and by doing so attaining high levels of socioeconomic equality and social justice.”<sup>259</sup> Moreover, “[s]ide by side with the booted commando in every totalitarian order is the teacher—missionary, preceptor, expositor, call him what we will.”<sup>260</sup>

<sup>254</sup> *Id.*

<sup>255</sup> See *infra* Section IV.A.

<sup>256</sup> Hollander, *supra* note 125, at 9, 12.

<sup>257</sup> David Lehman, *The Reign of Intolerance, in OUR COUNTRY, OUR CULTURE: THE POLITICS OF POLITICAL CORRECTNESS*, *supra* note 1, at 111, 111.

<sup>258</sup> Hollander, *supra* note 125, at 1.

<sup>259</sup> *Id.* at 16.

<sup>260</sup> Nisbet, *supra* note 156, at 193.

No matter how brutal and cynical, the communists were essentially politically correct, in the view of many academics. The influence of Marxism on contemporary academics is plainly revealed through surveys of academic views of Marxism. Survey data on self-reported ideology confirm that significant numbers of academics self-identify as radical, activist, or Marxist.<sup>261</sup> Of all departments, “sociology contains the most Marxists, at 25.5 percent,” according to Gross and Simmons.<sup>262</sup> Thus, as many as one quarter of sociologists openly identify themselves with the ideology responsible for more slaughter than the Holocaust.<sup>263</sup> By way of comparison, Robert Alter, a professor of literature, suggests that “no more than twenty percent of a department needs to be made up of ideological activists in order to ensure the takeover of the department.”<sup>264</sup> Within the social sciences as a whole, more than 17% of professors identify themselves as “Marxist.”<sup>265</sup> Within the social sciences, a combined 62% of professors identify as either “liberal radicals,” “liberal activists,” or “Marxist.”<sup>266</sup> Within the humanities, 50% of professors polled identified themselves as either “liberal radicals” “liberal activists” or “Marxist.”<sup>267</sup> Predictably, recent opinion research shows that up to half of young people between eighteen and twenty-nine years of age have a favorable view of

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<sup>261</sup> Neil Gross & Solon Simmons, *The Social and Political Views of American Professors* 40–41 (Working Paper, Sept. 24, 2007) (stating that survey data “indicates that self-identified Marxists are rare in academe today,” but also observing that a combined 28% of professors from the academic fields surveyed described themselves as either radical, activist, or Marxist), [http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.147.6141&rep=r\\_ep1&type=pdf](http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.147.6141&rep=r_ep1&type=pdf) [<https://perma.cc/Y2NY-9N8Q>]. But see Daniel B. Klein & Charlotta Stern, *By the Numbers: The Ideological Profile of Professors*, in THE POLITICALLY CORRECT UNIVERSITY 15, 27 (Robert Maranto, Richard E. Redding & Frederick M. Hess eds., 2009) (“Of the overall faculty of all kinds of schools, Marxists were 3.0 percent.”).

<sup>262</sup> Gross & Simmons, *supra* note 261, at 40.

<sup>263</sup> See sources cited *supra* notes 127–151 and accompanying text.

<sup>264</sup> Robert Alter, *The Persistence of Reading*, in OUR COUNTRY, OUR CULTURE: THE POLITICS OF POLITICAL CORRECTNESS, *supra* note 1, at 8, 10.

<sup>265</sup> Gross & Simmons, *supra* note 261, at 41 tbl.12.

<sup>266</sup> *Id.* This could mean that 38% of professors in the social sciences might therefore be moderate or conservative, but consider that 89% of social science professors voted for John Kerry or Ralph Nader in 2004, the latest election year for which data are available. *Id.* at 37 tbl.10.

<sup>267</sup> *Id.*

the word “socialism.”<sup>268</sup> As Stanley Rothman and S. Robert Lichter point out, “These days, there are literally more Marxists in faculty lounges than in the Kremlin.”<sup>269</sup>

Faculty partisan affiliation is even more overwhelmingly one-sided. 83.7% of humanities professors and 87.6% of social sciences professors voted for John Kerry in 2004.<sup>270</sup> From 1984 to 2000, the ratio of Democrat to Republican faculty grew from 2–1 in 1984 to 3–1 in 2000.<sup>271</sup> Such political uniformity surely enhances ideological rigidity across disciplines. As for law schools, George Dent laments that liberal uniformity among law professors creates an “echo chamber” which impedes “an accurate understanding of contemporary reality.”<sup>272</sup> If conservatives “try to get on in academia, they find themselves watering down their ideas and cloaking or misrepresenting who they really are.”<sup>273</sup> The next generation of scholars will be as rigid if not more rigid in their commitment to leftist doctrine, if one compelling report on Texas’s two top public universities is any indication of larger trends.<sup>274</sup>

<sup>268</sup> *Little Change in Public’s Response to ‘Capitalism,’ ‘Socialism’*, PEW RES. CENTER (Dec. 28, 2011), <http://www.people-press.org/2011/12/28/little-change-in-publics-response-to-capitalism-socialism/?src=prc-headline> [<https://perma.cc/W4FX-E2U4>] (Pew survey showing that people in age range eighteen through twenty-nine see socialism as a positive by a 49–43 margin); Peter Moore, *One Third of Millennials View Socialism Favorably*, YOUNGOV (May 11, 2015, 7:42 AM), <https://today.yougov.com/news/2015/05/11/one-third-millennials-like-socialism/> [<https://perma.cc/933X-NPNA>] (poll showing that among eighteen through twenty-nine year-olds, 36% have a favorable opinion of socialism, compared with 26% of thirty through forty-four year-olds, 24% of forty-five through sixty-four year-olds, and 15% of those over sixty-five).

<sup>269</sup> Stanley Rothman & S. Robert Lichter, *The Vanishing Conservative—Is There a Glass Ceiling?*, in THE POLITICALLY CORRECT UNIVERSITY, *supra* note 261, at 60, 69.

<sup>270</sup> Klein & Stern, *supra* note 261, at 21.

<sup>271</sup> Rothman & Lichter, *supra* note 269, at 68–69.

<sup>272</sup> George W. Dent, Jr., *Toward Improved Intellectual Diversity in Law Schools*, 37 HARV. J. L. & PUB. POL’Y 165, 166 (2014).

<sup>273</sup> Daniel B. Klein & Charlotta Stern, *Groupthink in Academia: Majoritarian Departmental Politics and the Professional Pyramid*, 13 INDEP. REV. 585, 598 (2009).

<sup>274</sup> A report by the National Association of Scholars (“NAS”) quantified the overrepresentation of leftist course offerings within the history department of Texas’s two premier public universities. NAT’L ASS’N OF SCHOLARS, RECASTING HISTORY: ARE RACE, CLASS, AND GENDER DOMINATING AMERICAN HISTORY? 5 (2013), [https://www.nas.org/images/documents/Recasting\\_History.pdf](https://www.nas.org/images/documents/Recasting_History.pdf) [<https://perma.cc/GF8X-4CTT>]. The NAS report  
(continued)

### B. The Left's "Long March Through the Institutions"

The hegemony of leftist officials and faculty in the American educational system is neither accidental nor the product of random selection. In the 1960s, when it became obvious that Western democracies would never submit to communism, leftist activists consciously changed tactics and sought to influence important institutions within democracies, rather than advocate revolution.<sup>275</sup> This effort was named the "long march through the institutions," in the words of Rudi Dutschke, a famous socialist martyr.<sup>276</sup> The "long march" is a reference to Mao Zedong's Long March (1934–1935) where he led the Red Army on a patient, grueling, and dangerous 6,000-mile trek to evade Nationalist forces.<sup>277</sup> A sizable element of the Red Army successfully evaded the Nationalists, lived to

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examined the research subject interests of each of the forty-six history faculty at the University of Texas ("UT") and Texas A&M University at College Station ("A&M"), together with the assigned readings for each of eighty-five history courses taught in the Fall 2010 semester. *Id.* The report found that 78% of UT faculty and 64% of A&M faculty had "special research interests in [race, class, and gender topics]." *Id.* at 6. History faculty members who received their Ph.D.s in the 1990s or later displayed even greater uniformity: Of UT history faulty who received their Ph.D.s in the 1990s or later, 83% had race, class or gender research interests. *Id.* Of A&M history faculty who received their Ph.D.s in the 1990s or later, 90% had race, class or gender research interests. *Id.*

<sup>275</sup> See, e.g., Rudi Dutschke, *On Anti-authoritarianism*, in THE NEW LEFT READER 243, 279 (Carl Oglesby ed., 1969) (referring to rallies held outside universities and meetings held within schools as better alternatives to "the lukewarm opposition movement").

<sup>276</sup> *Id.* at 249 ("Our historically correct limitation of our action to the university should not be made into a fetish. A revolutionary dialectic of the correct transitions must regard the 'long march through the institutions' as a practical and critical action in all social spheres.").

<sup>277</sup> Angela Kölling, *Literature and Politics in Joschka Fischer's Mein langer Lauf zu mir selbst: A Negotiation of Wirklichkeit (Credibility) and Wirksamkeit (Effect)*, in LITERATURE AND POLITICS 191, 191 (Peter Marks ed., 2012) (relating Mao's Long March to "the New Left", which was fond of the Long March comparison and "considered persistence in and coordination of heterogeneous actions as key to conquering power positions in the political and social spheres."). See also, e.g., SUN SHUYUN, THE LONG MARCH: THE TRUE HISTORY OF COMMUNIST CHINA'S FOUNDING MYTH (2007) (providing discussion of setbacks and unflattering strategic failures along Long March); HARRISON E. SALISBURY, THE LONG MARCH: THE UNTOLD STORY (1985) (providing hagiographic treatment of Mao and the communist movement).

fight another day, and ultimately prevailed in the Communist takeover of mainland China.<sup>278</sup>

Roger Kimball notes that the 1960s Long March consisted of leftists who patiently and nonconfrontationally entered crucial institutions in American society and transformed them from the inside.<sup>279</sup> Theologian Tracey Rowland explains this profoundly consequential strategy:

Instead of a long military march, such as the one undertaken by [Mao Zedong], in the highly developed western countries the long march would be through the most culturally significant of our social institutions—that is, through schools, universities, courts, parliaments and through the media, through newspapers and television.<sup>280</sup>

The 1960s Long March illustrated that leftists adopted “a long-term strategic-political perspective . . . as [the] key to conquering power positions in the political and social spheres.”<sup>281</sup> For example, as philosopher John Searle maintains, “During the 1960s a fairly sizable number of leftist intellectuals became convinced that the best arena of social change was culture . . .”<sup>282</sup> Searle notes, “[U]niversity departments of literature in particular could become important weapons in the struggle to overcome racism, imperialism, et cetera. We are now witnessing some of the consequences of this migration.”<sup>283</sup> A number of popular works highlight the intimate ideological linkage between communism, leftist intellectuals, and contemporary liberalism.<sup>284</sup> Andrew Delbanco, a

<sup>278</sup> See generally, e.g., SHUYUN, *supra* note 277; SALISBURY, *supra* note 277.

<sup>279</sup> ROGER KIMBALL, THE LONG MARCH: HOW THE CULTURAL REVOLUTION OF THE 1960S CHANGED AMERICA 15 (2000).

<sup>280</sup> Tracey Rowland, *Comunione e Liberazione: Christ and Culture in the Contest Between Giussani and Gramsci*, AUSTRALIAN BROADCASTING CORP. RELIGION & ETHICS (Mar. 25, 2013), <http://www.abc.net.au/religion/articles/2013/03/25/3723165.htm> [<https://perma.cc/W7YU-M44G>].

<sup>281</sup> Kölling, *supra* note 277, at 191.

<sup>282</sup> John R. Searle, *Is There a Crisis in American Higher Education?*, in OUR COUNTRY, OUR CULTURE: THE POLITICS OF POLITICAL CORRECTNESS, *supra* note 1, at 227, 236.

<sup>283</sup> *Id.*

<sup>284</sup> See, e.g., MICHAEL WALSH, THE DEVIL'S PLEASURE PALACE: THE CULT OF CRITICAL THEORY AND THE SUBVERSION OF THE WEST (2015) (conservative critique of critical theory and cultural Marxism by former associate editor of Time magazine); PAUL KENGOR, DUPES: HOW AMERICA'S ADVERSARIES HAVE MANIPULATED PROGRESSIVES FOR A CENTURY (2010); (*continued*)

humanities professor, concludes, “The sixties generation, in short, became permanently estranged from the political traditions of the American republic—and this is the generation that is now moving into the intellectual and administrative leadership of our universities.”<sup>285</sup> The stakes of leadership are high, for control of educational institutions brings with it the power to indoctrinate. “Control of the curriculum meant shaping the mind of the next generation” in a rigidly leftist direction, according to Morris Dickstein, a professor of English and theatre.<sup>286</sup>

It is important to keep in mind that, as Hollander notes, after “[t]he qualified disillusionment with communism” following the exposure of the regimes, the left nonetheless maintained communism’s “critiques and rejection of Western societies—especially of the United States.”<sup>287</sup> “The New Left of the 1960s . . . certainly lost interest in and enthusiasm for the Soviet Union. But that change in attitude did not lead to a searching and critical look at the broader ideas associated with the left.”<sup>288</sup> Communist regimes fell, but certain Marxist ideals and resentments remained, and with those ideals and resentments follow various institutional responses. The 1960s Long March embedded the doctrines of “critical theory,” cultural Marxism, and their varied modern offshoots such as critical race theory—all fruits of the same ideology that brought the world Stalin’s Great Purges, the Gulag, Soviet show trials, the Great Leap Forward, and the Cultural Revolution.<sup>289</sup>

Because of academic bias, the public does not fully appreciate the magnitude of communism’s crimes. The horrific consequences of communism, including the egalitarian suppression of speech, are overlooked or silenced. This silence is imposed by leftist academics, an ideological bloc that has, for decades, rationalized or downplayed the consequences of communist regimes out of sympathy for the aims, personalities, and supposed ideals associated with communism. The public is thus unable to identify the totalitarian rationale underlying speech regulation. Under communist regimes, the law was used to impose and

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RONALD RADOSH, *COMMIES: A JOURNEY THROUGH THE OLD LEFT, THE NEW LEFT AND THE LEFTOVER LEFT* (2001).

<sup>285</sup> Andrew Delbanco, *The Politics of Separatism*, in *OUR COUNTRY, OUR CULTURE: THE POLITICS OF POLITICAL CORRECTNESS*, *supra* note 1, at 34, 38.

<sup>286</sup> Dickstein, *supra* note 122, at 48.

<sup>287</sup> Hollander, *supra* note 125, at 16.

<sup>288</sup> *Id.*

<sup>289</sup> See *supra* Part III.

maintain official doctrine.<sup>290</sup> Expressing a similar eagerness to exploit the law as a political tool, many modern leftists propose to regulate speech. Academia will most likely continue to incubate an increasingly embittered and entitled culture of victimhood, while uncritically promoting hate speech regulation. This dismal outcome will be due largely to the persistence of leftist ideology within the academy, an ideology historically influenced by Marxism.

#### V. THE PERSISTENCE OF TOTALITARIAN IDEOLOGY

Despite the awful human toll of communism, the doctrine's adherents are well-represented within the academy. As a result, generations of students have been treated to such insights as “[w]e know that the Right is racist, homophobic, and sexist.”<sup>291</sup> Harvard law professor Mark Tushnet wrote that, if he were a judge considering a case, he would decide by asking, “[W]hich result is, in the circumstances now existing, likely to advance the cause of socialism?”<sup>292</sup> Ideologues are welcome in the university, so long as they believe and teach the correct dogma. “[T]he secular ideological wars of the twentieth century killed far more people than all the religious wars of history combined,” Stephen Carter notes: “[y]et secular ideologies are not banned from the liberal public square because of their dangers.”<sup>293</sup> Far from being banned—an outcome evidently reserved for ideas of the political right—the secular ideology of the left is systematically promoted.

Many people who consider themselves pragmatists will resist the notion that academic doctrines can profoundly impact the structure of a free society. The pragmatic mind may ask, what does leftist dogma within the ivory tower have to do with me? That question is best answered by Polish writer Czeslaw Milosz, who tells the true story of a nation that fell asleep then awoke to find itself under Soviet dictatorship.<sup>294</sup> Milosz observed that, prior to the Soviet dictatorship, “the great intellectual work

<sup>290</sup> See *infra* Part V.

<sup>291</sup> Julia Lesage, *Women's Rage*, in MARXISM AND THE INTERPRETATION OF CULTURE 419, 428 (Cary Nelson & Lawrence Grossberg eds., 1988).

<sup>292</sup> Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981).

<sup>293</sup> Stephen L. Carter, *Liberal Hegemony and Religious Resistance: An Essay on Legal Theory*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 25, 52 (Michael W. McConnell et al. eds., 2001).

<sup>294</sup> See MIOSZ, *supra* note 157, at ix–x.

of the Marxists could easily pass as just one more variation on a sterile pastime.”<sup>295</sup> “It was only toward the middle of the twentieth century that the inhabitants of many European countries came, in general unpleasantly, to the realization that their fate could be influenced directly by intricate and abstruse books of philosophy.”<sup>296</sup> Like many Americans today, Europeans of Milosz’s time did not fully recognize the influence of elite ideas on their own lives until it was too late. Yet, once the resentful new philosophy took hold, “[t]heir bread, their work, their private lives began to depend on this or that decision in disputes on principles to which, until then, they had never paid any attention.”<sup>297</sup> The seemingly arcane realm of ideology suddenly came to life and transformed free societies. A similar process of ideologically driven social transformation is occurring today. Nowhere is this process more apparent than in the American educational system.

#### *A. Critical Theory, Cultural Marxism, and the Entrenchment of Leftist Orthodoxy*

As a consequence of the 1960s Long March, variants of Marxist doctrine became deeply entrenched across a broad range of American academic disciplines. This Marxist influence operates under the general framework of critical theory, which is essentially leftist ideological doctrine disguised as—or, more charitably, imposed upon—scholarly inquiry.<sup>298</sup> “[C]ritical theory accepts the Marxist critique of capitalism which sees all social problems as ultimately rooted in the irrationality and contradictions of the capitalist mode of production,” according to Douglas Kellner, a renowned scholar of Marxism.<sup>299</sup> Lesage, a Marxist, asserts that “the canon of . . . critical theory is based on Marx and Freud.”<sup>300</sup> Mark Poster, who was a prominent proponent of critical theory, noted, “Critical theory, as defined long ago by Max Horkheimer, attempts to promote the project of emancipation by furthering what it understands as the theoretical effort of the critique of domination begun by the Enlightenment and

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<sup>295</sup> *Id.* at 3.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> See Douglas Kellner, *Critical Theory and the Crisis of Social Theory*, 33 Soc. PERSP. 11, 22 (1990).

<sup>299</sup> *Id.*

<sup>300</sup> Lesage, *supra* note 291, at 424.

continued by Karl Marx.<sup>301</sup> Professor Max Horkheimer (1895–1973), German sociologist and philosopher, was an originator of critical theory.<sup>302</sup> “Horkheimer and his associates firmly adhere to the Marxist standpoint that the economy is the crucial determining factor for all social life and individual activity,” as Kellner writes.<sup>303</sup> “‘Critical Theory’ in the narrow sense designates several generations of German philosophers and social theorists in the Western European Marxist tradition known as the Frankfurt School.”<sup>304</sup> The Frankfurt School is openly identified as “the Frankfurt School of Marxism” by leading leftist scholars like Terry Eagleton.<sup>305</sup> The Frankfurt School’s Marxist doctrines have profoundly impacted intellectual pursuits and the broader American society.<sup>306</sup> “Anyone who underwent a liberal-arts education in recent decades probably encountered

<sup>301</sup> MARK POSTER, CRITICAL THEORY AND POSTSTRUCTURALISM 1, 1 (1989). See also Matthew Reisz, *Mark Poster, 1941–2012*, TIMES HIGHER EDUC. (Nov. 8, 2012), <https://www.timeshighereducation.com/news/people/obituaries/mark-poster-1941-2012/421721.article> [https://perma.cc/RKG7-6PT6] (Poster was “[a] scholar who was crucial in bringing French critical theory to the US.”).

<sup>302</sup> POSTER, *supra* note 301, at 1.

<sup>303</sup> Kellner, *supra* note 298, at 22.

<sup>304</sup> James Bohman, *Critical Theory*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2016 ed.) (2005), <http://plato.stanford.edu/archives/win2015/entries/critical-theory/> [https://perma.cc/37B2-USAG]. Bohman notes:

[M]any “critical theories” in the broader sense have been developed. They have emerged in connection with the many social movements that identify varied dimensions of the domination of human beings in modern societies. In both the broad and the narrow senses, however, a critical theory provides the descriptive and normative bases for social inquiry aimed at decreasing domination and increasing freedom in all their forms.

*Id.*

<sup>305</sup> TERRY EAGLETON, IDEOLOGY 127 (1991).

<sup>306</sup> See Alex Ross, *The Naysayers: Walter Benjamin, Theodor Adorno, and the Critique of Pop Culture*, NEW YORKER (Sept. 15, 2014), <https://www.newyorker.com/magazine/2014/09/15/naysayers> [https://perma.cc/26WK-NRKR]; Kellner, *supra* note 299, at 29.

the thorny theorists . . . known as the Frankfurt School” for whom “Marx was central to their thought . . . ”<sup>307</sup>

Horkheimer was director of the Frankfurt School, which is widely acknowledged as a forum for promulgating European Marxism in the United States.<sup>308</sup> “For many years, ‘critical theory’ stood as a code word for the [Frankfurt School’s] Marxism and for its attempt to found a radical supra-disciplinary social theory rooted in Hegelian-Marxian dialectics, historical materialism, and the Marxist critique of political economy and theory of revolution,” Kellner observes.<sup>309</sup> In Horkheimer’s famous description, critical theory “is an essential element in the historical effort to create a world which satisfies the needs and powers of men.”<sup>310</sup> Critical theory, he wrote, is intended to be a “liberating and stimulating influence” whose “goal is man’s emancipation from slavery.”<sup>311</sup> Horkheimer’s conception of liberation and emancipation entailed a simple doctrinal commitment. In 1968, Horkheimer would write, “The doctrine of Marx and Engels, though still indispensable for understanding the dynamics of society, can no longer explain the domestic development and foreign relations of the nations.”<sup>312</sup> Despite his caveat that Marxism “can no longer explain” some policy developments, Marxism is central to Horkheimer’s intellectual framework.<sup>313</sup> In describing “the concerns of critical thought,” Horkheimer explains, “The Marxist categories of class, exploitation, surplus value, profit, pauperization, and breakdown are elements in a conceptual whole, and the meaning of this whole is to be sought not in the preservation of contemporary society but in its transformation into the right kind of society.”<sup>314</sup> Critical theory evolved into other theories with the same fixed doctrinal core. Subsequent theorists

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<sup>307</sup> Ross, *supra* note 306. See also Douglas Kellner, *Cultural Marxism and British Cultural Studies*, in 1 ENCYCLOPEDIA OF SOCIAL THEORY, 171, 172 (George Ritzer ed., 2005) (noting that the Frankfurt School included “Western Marxists”).

<sup>308</sup> See Kellner, *supra* note 298, at 29; Kellner, *supra* note 307, at 173.

<sup>309</sup> Kellner, *supra* note 298, at 20.

<sup>310</sup> Max Horkheimer, *Postscript*, in CRITICAL THEORY: SELECTED ESSAYS 244, 246 (Matthew J. O’Connell et al. trans., Continuum Pub. Corp. 1989).

<sup>311</sup> *Id.*

<sup>312</sup> Max Horkheimer, *Preface*, in CRITICAL THEORY: SELECTED ESSAYS, *supra* note 310, at v, v–vi.

<sup>313</sup> *Id.* at vi, xii–xiii.

<sup>314</sup> HORKHEIMER, *Traditional and Critical Theory*, in CRITICAL THEORY: SELECTED ESSAYS, *supra* note 310, at 188, 218.

continued looking to Marx as a major source of historical explication and ongoing insight.

### *1. Cultural Marxism*

In political scientist Richard Weiner's favorable exposition of cultural Marxism, he notes that cultural Marxism "starts from the assumption that Marxism is still the theory and practice that could at once explain and transform" society.<sup>315</sup> Weiner notes that "cultural Marxism" is "derived from the theorizing of Georg Lukacs, Antonio Gramsci, and the Frankfurt School."<sup>316</sup> As discussed above, the Frankfurt School promulgated a version of Marxism.<sup>317</sup> "Many twentieth-century Marxian theorists, ranging from Georg Lukács, Antonio Gramsci, Ernst Bloch, Walter Benjamin, and T.W. Adorno to Fredric Jameson and Terry Eagleton, employed the Marxian theory to analyze cultural forms," Kellner writes.<sup>318</sup> "Traditions of cultural Marxism are thus important to the trajectory of cultural studies and to understanding its various types and forms in the present age" according to Kellner.<sup>319</sup> Cultural Marxism is premised on a core doctrinal concept concerning the supposed economic basis of culture: "The economic base of society for Marx and Engels consisted of the forces and relations of production in which culture and ideology are constructed to help secure the dominance of ruling social groups."<sup>320</sup> That core premise explains the leftist penchant for interpreting racist, sexist, or classist plots into seemingly any movie, book, toy, sport, song, or other human creation.<sup>321</sup> The pervasiveness of leftist interpretations of culture

<sup>315</sup> 125 RICHARD R. WEINER, CULTURAL MARXISM AND POLITICAL SOCIOLOGY 18 (SAGE Pub. 1981).

<sup>316</sup> *Id.* at 17.

<sup>317</sup> *Supra* Section IV.A.

<sup>318</sup> Kellner, *supra* note 307, at 171.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> Michael Ryan, *The Politics of Film: Discourse, Psychoanalysis, Ideology*, in MARXISM AND THE INTERPRETATION OF CULTURE, *supra* note 291, at 477, 485 ("Films . . . disclose the contours of ideology, the way desire and fear are channeled to assure the hegemony of white-male-dominated capitalism. On the other hand, they also provide a record of popular energies emerging out of structural differences in society which threaten to disturb hegemony."); Hilton Kramer, *Confronting the Monolith*, in OUR COUNTRY, OUR CULTURE: THE POLITICS OF POLITICAL CORRECTNESS, *supra* note 1, at 72, 72 ("[I]n the realm of education, culture, and the arts the champions of PC . . . have succeeded in changing the  
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bespeaks the Soviet norm that “the author should perceive elements of the class struggle in every phenomenon.”<sup>322</sup> Remaining true to its Marxist roots, today’s left-wing orthodoxy is deeply influential in matters beyond economics and politics. Economist Ludwig von Mises perceived the broad cultural influence of Marxism to be vast, as early as 1952: “The ideas of Marx and of his philosophy truly dominate our age. The interpretation of current events and the interpretation of history in popular books, as well as in philosophical writings, novels, plays, and so forth, are by and large Marxist.”<sup>323</sup> Consider Donald Lazere’s recent boast that “Marxist analysis has provided an incisive tool for studying the political signification in every facet of contemporary culture, including popular entertainment in television, film and photography, music, mass market books, advertising, newspaper and magazine features, comics, fashion, tourism, sports and games.”<sup>324</sup>

Cultural Marxists “perceived culture as a mode of ideological reproduction and hegemony in which cultural forms help to shape the modes of thought and behavior that induce individuals to adapt to the social conditions of capitalist societies.”<sup>325</sup> However, culture could also be “a potential form of resistance to capitalist society.”<sup>326</sup> The Frankfurt School “sought to analyze ‘hegemonic,’ or ruling, social and cultural forces of domination and to seek ‘counterhegemonic’ forces of resistance

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way books, ideas, and every intellectual and artistic endeavor are discussed and assessed.”); ROLAND BARTHES, MYTHOLOGIES 59 (Richard Howard trans., Hill and Wang 2012) (1957) (discussing the role of toys in reinforcing capitalist social relations); ALLEN GUTTMANN, FROM RITUAL TO RECORD: THE NATURE OF MODERN SPORTS 67 (new afterword ed., Columbia Univ. Press 2004) (1978) (“The Neo-Marxists maintain that society’s rules are exploitative, grossly unfair, and immoral. Sport helps to socialize us into accepting rules which are inherently unjust and unfair and into assuming falsely that justice can be subsumed under fair play.”); George Lipsitz, *Working People’s Music, in AMERICAN MEDIA AND MASS CULTURE: LEFT PERSPECTIVES* 293, 293 (Donald Lazere ed., 1987) (“The singular contribution of the New Left has been its understanding of the importance of culture in the struggle to change society.”).

<sup>322</sup> MIŁOSZ, *supra* note 157, at 216.

<sup>323</sup> LUDWIG VON MISES, MARXISM UNMASKED: FROM DELUSION TO DESTRUCTION 2 (2006).

<sup>324</sup> Donald Lazere, *Introduction: Entertainment as Social Control, in AMERICAN MEDIA AND MASS CULTURE: LEFT PERSPECTIVES*, *supra* note 321, at 1, 5.

<sup>325</sup> Kellner, *supra* note 307, at 174.

<sup>326</sup> *Id.*

and struggle.”<sup>327</sup> The “forces of domination”, according to legions of academics, are strictly defined by leftist race/class/gender dogmas.<sup>328</sup> Every tradition, every rule, every standard is to be critiqued and transgressed upon, except for the traditions, rules, and standards of leftist faith.

Despite the self-evident substance of cultural Marxism, the arbiters of correct attitudes, such as the Southern Poverty Law Center, excoriate conservatives for noticing cultural Marxism:

“Cultural Marxism,” described as a conspiratorial attempt to wreck American culture and morality, is the newest intellectual bugaboo on the radical right. . . . Right-wing ideologues, racists and other extremists have jazzed up political correctness and repackaged it—in its most virulent form, as an anti-Semitic theory that identifies Jews in general and several Jewish intellectuals in particular as nefarious, communistic destroyers. These supposed originators of “cultural Marxism” are seen as conspiratorial plotters intent on making Americans feel guilty and thus subverting their Christian culture.<sup>329</sup>

In fact, cultural Marxism has an extensive pedigree, as a doctrine that scholars explicitly explore and promulgate as—in so many words—“cultural Marxism.”<sup>330</sup> For Weiner, author of the book *Cultural Marxism*

<sup>327</sup> *Id.* at 175.

<sup>328</sup> *Id.* at 174–75.

<sup>329</sup> Bill Berkowitz, ‘*Cultural Marxism’ Catching On*, SOUTHERN POVERTY L. CTR. (Aug. 15, 2003), <https://www.splcenter.org/fighting-hate/intelligence-report/2003/%E2%80%99cultural-marxism%E2%80%99-catching> [<https://perma.cc/7DQH-B4LL>].

<sup>330</sup> DENNIS DWORKIN, CULTURAL MARXISM IN POSTWAR BRITAIN: HISTORY, THE NEW LEFT, AND THE ORIGINS OF CULTURAL STUDIES 4 (Stanley Fish & Fredric Jameson eds., 1997) (noting that the Frankfurt School was a “Marxist-inspired tradition that has influenced contemporary discussions of culture”); FREDRIC JAMESON, JAMESON ON JAMESON: CONVERSATIONS ON CULTURAL MARXISM 17 (Ian Buchanan ed., 2007) (explaining that the term “culture” is understood to mean “daily life and daily practices in general”). See also Lawrence Grossberg and Cary Nelson, *Introduction: The Territory of Marxism*, in MARXISM AND THE INTERPRETATION OF CULTURE, *supra* note 291, at 1, 1. (“[T]he proper horizon for interpretive activity, whatever its object and whatever its disciplinary base, is the entire field of cultural practices” with “Marxism at the center of such developments.”).

and *Political Sociology*, cultural Marxism “was conceived with a practical intent,” and “is marked by strong moral elements.”<sup>331</sup> Marxism also reveals itself in a specific modern style of engaging the search for truth.

Under the Stalinist regimes, there was a “will to deny that there might be an objective truth, independent of the party’s instructions and the orders of the leader, a truth in the light of which those instructions and orders might be submitted to critical examination.”<sup>332</sup> The ideological commonalities with the present state of discourse are numerous, as are the societal effects.<sup>333</sup> Like the totalitarian progressives of the twentieth century, some modern leftists reject the notion of objective truth.<sup>334</sup> “[I]f there is no external reality subject to partition and definition, then different viewpoints generate different understandings of events . . .”<sup>335</sup> Welch, a feminist, favors a “creation of a politics of truth that defines the true as that which liberates and furthers specific processes of liberation.”<sup>336</sup> Judge Richard Posner concluded of critical race theory that “it turns its back on the Western tradition of rational inquiry.”<sup>337</sup> While cultural Marxists—together with leftists more broadly—cherish their own moral nostrums, all other intellectual and cultural traditions come under caustic scrutiny at the hands of academics. Influential educator Henry Giroux, in a book chapter entitled “Schooling as a Form of Cultural Politics,” rejects what he calls “a spurious appeal to objectivity, science, truth, universality, and the suppression of difference.”<sup>338</sup> Inspired by such ideas, narrow grievances

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<sup>331</sup> WEINER, *supra* note 315, at 18.

<sup>332</sup> LEYS, *supra* note 113, at 131; *Pierre Ryckmans Obituary*, *supra* note 240.

<sup>333</sup> LEYS, *supra* note 113, at 129.

<sup>334</sup> *Id.* at 131.

<sup>335</sup> BETTY JEAN CRAIGE, RECONNECTION: DUALISM TO HOLISM IN LITERARY STUDY 111 (Ellen Harris ed., 1988).

<sup>336</sup> SHARON D. WELCH, COMMUNITIES OF RESISTANCE AND SOLIDARITY: A FEMINIST THEOLOGY OF LIBERATION 31 (Mary Heffron ed., 1985).

<sup>337</sup> Richard A. Posner, *The Skin Trade*, 217(15) NEW REPUBLIC, Oct. 13, 1997, at 40, 42 (reviewing DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997)).

<sup>338</sup> Henry A. Giroux, *Schooling as a Form of Cultural Politics: Toward a Pedagogy of and for Difference*, in CRITICAL PEDAGOGY, THE STATE, AND CULTURAL STRUGGLE 125, 139, 147 (Henry A. Giroux & Peter L. McLaren eds., 1989) (calling for teachers to be “transformative intellectuals” which means “taking a stand against forms of oppression, and treating students as if they ought also to be concerned about the issues of social justice and political action”).

and victimhood become the conceptual centerpiece of scholarly inquiry, and the pursuit of objective inquiry loses its appeal. Due to the sheer magnitude of their presence in academic positions, and the uncritical dissemination of their doctrines, critical theory, cultural Marxism, critical race theory, and other related orthodoxies have a deep influence on curricula and the wider culture.<sup>339</sup> Art critic Hilton Kramer observes, “[I]n the realm of education, culture, and the arts the champions of PC . . . have succeeded in changing the way books, ideas, and every intellectual and artistic endeavor are discussed and assessed.”<sup>340</sup>

## 2. “Critical” Theories Today

Nearly every student of the social sciences, humanities, or law is directly familiar with, if not intimately tutored in, the precepts of critical theory, cultural studies, literary criticism, critical legal studies, critical race theory, and even whiteness studies. These theories are—as formulated, transmitted, and practiced—heavily Marxist in orientation. As for cultural studies, “[t]raditions of cultural Marxism are . . . important to the trajectory of cultural studies.”<sup>341</sup> Ben Agger noted, approvingly, “One of the projects of a politicized cultural studies is precisely to redevelop a Marxist cultural theory that . . . [holds] fast to one or another absolutist version of left-wing critical practice and politics.”<sup>342</sup> Kellner writes that, starting in the 1980s, cultural studies “turned from the socialist and revolutionary politics of the previous stages to postmodern forms of identity politics.”<sup>343</sup> Kellner asserts that modern cultural studies have turned away from Marxism, yet it is evident that “postmodern forms of identity politics” remain entirely consistent with leftist orthodoxy.<sup>344</sup> As Kellner recognizes, “Critical cultural studies insisted that the politics of representation must engage class, gender, race, and sexuality, thus correcting lacunae in earlier forms of cultural Marxism.”<sup>345</sup> Indeed, “cultural Marxism” continues to “strengthen[] the arsenal of cultural studies,” with the goal to “empower people to gain sovereignty over their culture and to be able to struggle for

<sup>339</sup> *Id.* at 128–29.

<sup>340</sup> Kramer, *supra* note 321, at 72.

<sup>341</sup> Kellner, *supra* note 307, at 171.

<sup>342</sup> BEN AGGER, CULTURAL STUDIES AS CRITICAL THEORY 47 (Falmer Press 1992).

<sup>343</sup> Kellner, *supra* note 307, at 175.

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* at 176.

alternative cultures and political change.<sup>346</sup> Cultural Marxism, then, is still an active doctrine, even though its influence is now comingled with new grievances and continual—if not empirically robust or persuasive—scholarly extrapolations. In the field of literary criticism, it is completely commonplace for mainstream professors to note, “By far the most pervasive mode of social critique in literary theory and in the modern history of thinking about literature remains the Marxist one.”<sup>347</sup> Within legal scholarship, critical legal studies similarly advanced along the 1960s Long March.<sup>348</sup> “[C]ritical legal studies is a political location for a group of people on the Left who share the project of supporting and extending the domain of the Left in the legal academy,” Tushnet writes.<sup>349</sup> Critical race theory combines intense racial grievances with ordinary Marxism.<sup>350</sup> Critical race theory has a growing influence in the field of teacher education.<sup>351</sup> Posner concludes his critique of critical race theorists, writing, “Their lodgment in the law schools is a disgrace to legal education, which lacks the moral courage and the intellectual self-confidence to pronounce a minority movement’s scholarship bunk.”<sup>352</sup> Even the field of whiteness studies points to Marx: “[W]hiteness” provides “the latest answer to the old question . . . ‘[w]hy is there no socialism in the

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<sup>346</sup> *Id.* at 177.

<sup>347</sup> Professor Paul Fry, Lecture, 17. *The Frankfurt School of Critical Theory*, YOUTUBE (Sept. 1, 2009), <https://www.youtube.com/watch?v=FFpGf7aPXNA> [<https://perma.cc/MQ3J-USA5>].

<sup>348</sup> See Tushnet, *supra* note 190, at 1515–16.

<sup>349</sup> *Id.* at 1516–17.

<sup>350</sup> See, e.g., Sunera Thobani, *Race, Sovereignty, and Empire: Theorizing the Camp, Theorizing Postmodernity*, in THEORIZING ANTI-RACISM: LINKAGES IN MARXISM AND CRITICAL RACE THEORIES 280, 301–02 (Abigail B. Bakan & Enakshi Dua eds., 2014).

<sup>351</sup> See, e.g., Gloria Ladson-Billings, *Race . . . to the Top, Again: Comments on the Genealogy of Critical Race Theory*, 43 CONN. L. REV. 1439, 1444–47 (2011); Thandeka K. Chapman, *Critical Race Theory and Teacher Education*, MYRIAD, 2011, at 8, 9, <https://www4.uwm.edu/msc/pdf/MyriadSpring2011.pdf> [<https://perma.cc/YH7T-XTAG>] (proponent of CRT admitting that “much of the teacher education research that uses CRT” does “frame the pre-service teacher as an ultra-powerful entity that must be re-programmed through an understanding of Whiteness and the prevalence of racism before he/she is allowed to teach children”).

<sup>352</sup> Posner, *supra* note 337, at 43.

United States?”<sup>353</sup> “Only through a confrontation with whiteness,” whiteness studies authors suggest, “can a revitalized American Left emerge.”<sup>354</sup> Socialism is somehow impeded by “whiteness,” therefore confronting “whiteness” may usher in a revived socialist tradition.<sup>355</sup>

The deepest and most consequential imposition of leftist doctrine is found in the study of American history. Howard Zinn’s radically left-wing, *A People’s History*, “has arguably had a greater influence on how Americans understand their past than any other single book,” according to historian Sam Wineburg.<sup>356</sup> In fact, Zinn’s ideological screed “has become the dominant narrative” of American history across academic disciplines.<sup>357</sup> What type of narrative is now America’s “dominant

<sup>353</sup> Peter Kolchin, *Whiteness Studies: The New History of Race in America*, 89 J. AM. HIST. 154, 167 (2002).

<sup>354</sup> *Id.*

<sup>355</sup> See *id.* at 154–55.

<sup>356</sup> Wineburg, *supra* note 188, at 28. Several glaring contradictions within Wineburg’s very thoughtful review of Howard Zinn’s *A People’s History* reveal that strident left-wing history is now the dominant narrative. Wineburg asserts that Zinn’s “stories acquaint students with a history too often hidden and too quickly brushed aside by traditional textbooks,” and “[m]any teachers view *A People’s History* as an anti-textbook, a corrective to the narratives of progress dispensed by the state.” *Id.* at 27–28. Yet, on the same page, Wineburg notes that, “[o]nce considered radical, *A People’s History* has gone mainstream.” *Id.* at 27. Indeed, “[f]or many students, *A People’s History* will be the first full-length history book they read, and for some, it will be the only one.” *Id.* at 28.

It is probably untenable to maintain that Zinn’s leftist history today will somehow “acquaint students with a history too often hidden and too quickly brushed aside” when that very leftist history is “mainstream” and “has arguably had a greater influence on how Americans understand their past than any other single book.” *Id.*

<sup>357</sup> *Id.* at 32. Zinn’s vision of history is the uncritically accepted “dominant narrative” in an incredible array of disciplines that present themselves as “critical”:

In the 32 years since its original publication, *A People’s History* has gone from a book that buzzed about the ear of the dominant narrative to its current status where, in many circles, it has *become* the dominant narrative. The book appears on university reading lists in economics, political science, anthropology, cultural studies, women’s studies, ethnic studies, Chicano studies, and African American studies, in addition to history. *A People’s History* remains a perennial favorite in courses for future teachers, and in some, it is the only history book on the syllabus.

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narrative” of history? “Zinn’s America is not a land of liberty but a land of relentless exploitation and hypocrisy” writes historian Michael Kammen.<sup>358</sup> Zinn was, according to the prominent leftist historian Michael Kazin, an “evangelist” of leftist belief.<sup>359</sup> Public schools at all levels selectively propagate Zinn’s “dominant narrative,” to the exclusion of competing narratives.<sup>360</sup> Incredibly, the American education system—much of it state owned—is propagating a Marxist interpretation of American history, and today that Marxist interpretation is the “dominant narrative” of American history.<sup>361</sup> Polish dissident Leszek Kolakowski warned, “People whose memory—personal or collective—has . . . become state-owned and perfectly malleable, totally controllable, are entirely at the mercy of their rulers; they have been deprived of their identity . . .”<sup>362</sup> When the state strips people of their “social and historical identity,” the people are no longer able to draw on the “source of strength” that is their “collective past.”<sup>363</sup> “[T]hey become people without historical consciousness, thus without the ability to define themselves except in relation to the state.”<sup>364</sup> Kolakowski’s warning might lead us to rethink the consequences of Zinn’s historical narrative.

Marxist doctrine survives, thrives, and predominates American intellectual life under the guise of the various critical theories. Moreover, the vanguard intellectuals see an important role for themselves. “The role of the critical theorist is to pierce the veil of hegemony that induces

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*Id.*

If Zinn’s leftist history is “the dominant narrative,” then—for today’s student—“traditional textbooks” are practically non-existent and Zinn’s leftist history is now the traditional textbook.

<sup>358</sup> Michael Kammen, *How the Other Half Lived*, WASH. POST (Mar. 23, 1980) [https://www.washingtonpost.com/archive/entertainment/books/1980/03/23/how-the-other-half-lived/ce505900-12fd-427d-a689-90edf3836309/?utm\\_term=.2ea6883be071](https://www.washingtonpost.com/archive/entertainment/books/1980/03/23/how-the-other-half-lived/ce505900-12fd-427d-a689-90edf3836309/?utm_term=.2ea6883be071) [https://perma.cc/U8FC-RYCY] (“We do deserve a people’s history; but not a singleminded, simpleminded history, too often of fools, knaves and Robin Hoods.”).

<sup>359</sup> Michael Kazin, *Howard Zinn’s History Lessons*, DISSENT, Spring 2004, <https://www.dissentmagazine.org/article/howard-zinns-history-lessons> [https://perma.cc/8WPT-TB5W].

<sup>360</sup> Wineburg, *supra* note 188, at 27.

<sup>361</sup> *Id.*

<sup>362</sup> Kolakowski, *supra* note 175, at 127.

<sup>363</sup> *Id.* at 131.

<sup>364</sup> *Id.* at 132.

compliance and acquiescence and to expose the failure of the legal system to fully deliver on its promises of equality, opportunity, security, and freedom.”<sup>365</sup> Implicit in this vision of critical theory are left-wing formulations of “equality, opportunity, security, and freedom.” Mainstream formulations of equality are rooted in the notion that “[e]veryone can succeed in this society, if they work hard enough.” However, that exact phrase is now deemed a microaggression<sup>366</sup> to be policed and regulated. Mainstream notions of opportunity are forbidden as well; the phrase “America is the land of opportunity,” is also an enumerated microaggression.<sup>367</sup> As for security, any policy designed to promote the physical security of the individual or nation is commonly denounced as racist.<sup>368</sup> Lastly, freedom is merely neoconservative window

<sup>365</sup> Douglass Litowitz, *Gramsci, Hegemony, and the Law*, 2000 BYU L. REV. 515, 543 (2000). See also Marcuse, *supra* note 12, at 81 (“[I]t is the task and duty of the intellectual to recall and preserve historical possibilities which seem to have become utopian possibilities . . . ”).

<sup>366</sup> Derald Wing Sue et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCHOLOGIST 271, 276 (2007), <https://world-trust.org/wp-content/uploads/2011/05/7-Racial-Microaggressions-in-Everyday-Life.pdf> [<https://perma.cc/A25K-AHTC>].

<sup>367</sup> Roy Baroff, *Microaggressions – Can We Shift the Landscape to Microaffirmations?* N.C. ST. U. (June 29, 2016), <https://facultyombuds.ncsu.edu/microaggressions-can-we-shift-the-landscape-to-microaffirmations/> [<https://perma.cc/2GPJ-PR49>] (citing *Tool: Recognizing Microaggressions and the Messages They Send* (on file with author)). See also Eugene Volokh, *UC Teaching Faculty Members Not to Criticize Race-Based Affirmative Action, Call America ‘Melting Pot,’ and More*, WASH. POST (June 16, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/16/uc-teaching-faculty-members-not-to-criticize-race-based-affirmative-action-call-america-melting-pot-and-more/?utm\\_term=.30d057eda904](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/16/uc-teaching-faculty-members-not-to-criticize-race-based-affirmative-action-call-america-melting-pot-and-more/?utm_term=.30d057eda904) [<https://perma.cc/Q7Q4-4PXD>] (discussing the same document in the context of a similar controversy involving the University of California system).

<sup>368</sup> Academics widely criticize punitive crime control policy as racist or racially insensitive. See, e.g., John T. Bennett, *It’s Not Jim Crow, It’s Jail: Questioning the Role of Race in the Origins of Punitive Policy*, 14 CARDOZO PUB. L., POL’Y & ETHICS J. 39, 56 (2015). See also Mitch Dudek & Esther Castillejo, *GOP Will Pay Political Price for Immigration Stance, Gutierrez Says*, CHI. SUN-TIMES (June 24, 2016, 11:19 AM), <https://chicago.suntimes.com/news/gop-will-pay-political-price-for-immigration-stance-gutierrez-says/> [<https://perma.cc/G5XA-VVGP>] (Democrat Congressman claims, “It speaks (continued)

dressing, according to some leftists.<sup>369</sup> When scholars claim that “[t]he role of the critical theorist is to . . . expose the failure of the legal system to fully deliver on its promises of equality, opportunity, security, and freedom,”<sup>370</sup> those scholars are evading the fact of leftist hegemony within the academy. Critical theorists scrupulously avoid questioning the hegemony of their own doctrines, or exposing the failure of their own favored theories and policy regimes, not least of which is censorship.

The role of the critical theorist, as practiced, is to protect the left’s ideological premises, while promulgating the left’s established truths. Critical theorists could ask, why should a doctrine that led to more death than Nazism be taken seriously as a diagnosis of modern society? If communism’s most significant accomplishments are mass slaughter and economic failure, why do adherents of this doctrine play such a large role in university education? What good did egalitarian speech regulation do for the millions slaughtered? In the decades following the 1960s long march, civil society failed to critique the critics or insist upon intellectual openness at any level of the educational system.<sup>371</sup> As a result, the calcified residue of Marxism is hegemonic. The hegemonic ideologues naturally push for increasingly radical demands and now flirt with the totalitarian dream of state censorship.

As the communist regimes demonstrated, hegemonic ideas are not intended to facilitate inquiry or understanding but to overpower and dominate. Contemporary leftist thought looks to Marxist-influenced critical theorists as a source of historical explication and insight for our times.<sup>372</sup> The hegemonic ideology in modern academia quite predictably shares the precepts and institutional prerogatives of its origins.<sup>373</sup> The persecution of opposing viewpoints remains perfectly logical.<sup>374</sup> Indeed,

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volumes of just how mean and xenophobic you can be” after a federal judge issued injunction against presidential executive action on immigration policy).

<sup>369</sup> Chantal Mouffe, *Hegemony and New Political Subjects: Toward a New Concept of Democracy*, in MARXISM AND THE INTERPRETATION OF CULTURE, *supra* note 291, at 89, 102 (criticizing “the neoconservative effort to sever the link between liberalism and democracy by redefining democracy as individual freedom. This is clearly a defense of private property . . .”).

<sup>370</sup> Litowitz, *supra* note 365, at 543.

<sup>371</sup> Hollander, *supra* note 125, at 1.

<sup>372</sup> VON MISES, *supra* note 323, at 2.

<sup>373</sup> Hollander, *supra* note 125, at 1.

<sup>374</sup> Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

the concept of “repressive tolerance” is the most vivid link between totalitarian communism and hate speech regulation.<sup>375</sup>

### B. Repressive Tolerance

Herbert Marcuse was a member of the “Frankfurt School of Marxism,” to use Terry Eagleton’s words.<sup>376</sup> Marcuse’s impact on American intellectual life was significant, as a member of the Frankfurt School, a prominent philosopher, and a leader of the 1960s radical student movement.<sup>377</sup> Like other members of the Frankfurt School, Marcuse came into academic power and privilege through the 1960s Long March.<sup>378</sup> In 1965, Marcuse published an influential essay entitled *Repressive Tolerance*, in which he expressed his concern that “tolerance mainly serves the protection and preservation of a repressive society.”<sup>379</sup> Because Marcuse’s thought was heavily shaped by Marxism, he believed that the evils of “institutionalized inequality” or “the class structure”<sup>380</sup> actually “weaken the effectiveness of tolerance toward dissenting and oppositional movements and to strengthen conservative and reactionary forces.”<sup>381</sup> The solution, as he described it, was “discriminating tolerance”<sup>382</sup> against “the self-styled conservatives, to the political Right.”<sup>383</sup> For Marcuse,

<sup>375</sup> 3 LESZEK KOLAKOWSKI, MAIN CURRENTS OF MARXISM: ITS ORIGINS, GROWTH AND DISSOLUTION 418 (Paul Stephen Falla trans., Oxford Univ. Press 1981) (1978).

<sup>376</sup> Eagleton, *supra* 305, at 127.

<sup>377</sup> Ronald Aronson, *Marcuse Today*, BOSTON REV. (Nov. 17, 2014), <http://bostonreview.net/books-ideas/ronald-aronson-herbert-marcuse-one-dimensional-man-today> [https://perma.cc/Q4DB-HSKS] (describing Marcuse’s book *One-Dimensional Man* as “a revelation”); Stephen J. Whitfield, *Refusing Marcuse: 50 Years After One-Dimensional Man*, DISSENT, Fall 2014, <https://www.dissentmagazine.org/article/refusing-marcuse-fifty-years-after-one-dimensional-man> [https://perma.cc/QTF9-FHCY] (Marcuse achieved “international fame” and “[b]efore the sixties had ended, he was commonly designated as the unofficial faculty advisor to the New Left.”); DAVID HAWKES, IDEOLOGY 130 (2d. ed., 2003) (1996) (“The philosophers associated with the Institute for Social Research . . . accomplished the most profound insights into the impact of the commodity on consciousness.”).

<sup>378</sup> KOLAKOWSKI, *supra* note 375, at 396.

<sup>379</sup> Marcuse, *supra* note 12, at 111.

<sup>380</sup> *Id.* at 84–85.

<sup>381</sup> *Id.* at 115–16.

<sup>382</sup> *Id.* at 119.

<sup>383</sup> *Id.* at 110.

“restraining the liberty of the Right”<sup>384</sup> was justified by “rational criteria.”<sup>385</sup> “Liberating tolerance” was the solution, meaning “intolerance against movements from the Right, and toleration of movements from the Left.”<sup>386</sup> Of particular relevance to the thesis of this article, Marcuse openly advocated “extreme suspension of the right of free speech and free assembly” against conservatives.<sup>387</sup> Marcuse even stated that “violence emanating from the rebellion of the oppressed classes”<sup>388</sup> brought about “progress in civilization.”<sup>389</sup> Stalin, Mao, and Pol Pot would wholeheartedly agree.

The following selection from *Repressive Tolerance* will further illustrate the influence of totalitarian ideology on Marcuse’s thought, as a leading leftist. Marcuse’s hope was that “a subversive majority could develop,” and that “undemocratic means” should be used to facilitate the dominance of that “subversive majority”<sup>390</sup>:

[T]he ways should not be blocked on which a subversive majority could develop, and if they are blocked by organized repression and indoctrination, their reopening may require apparently undemocratic means. They would include the withdrawal of toleration of speech and assembly from groups and movements which promote aggressive policies, armament, chauvinism, discrimination on the grounds of race and religion, or which oppose the extension of public services, social security, medical care, etc.<sup>391</sup>

After repressing the speech of seemingly anyone opposed to the welfare state, the very consciousness of society would need to be reshaped in conformity with the correct doctrine. Consequently, *Repressive Tolerance* entailed a new approach to education:

Moreover, the restoration of freedom of thought may necessitate new and rigid restrictions on teaching and

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<sup>384</sup> *Id.* at 119.

<sup>385</sup> *Id.* at 101.

<sup>386</sup> *Id.* at 109.

<sup>387</sup> *Id.*

<sup>388</sup> *Id.* at 107.

<sup>389</sup> *Id.*

<sup>390</sup> *Id.* at 100.

<sup>391</sup> *Id.*

practices in the educational institutions which, by their very methods and concepts, serve to enclose the mind within the established universe of discourse and behavior—thereby precluding *a priori* a rational evaluation of the alternatives.<sup>392</sup>

Given that Marcuse draws such a sharp line between the different rights afforded to various political groupings, the stakes involved in this line drawing are high. Marcuse addresses the “question as to who is to decide on the distinction between liberating and repressive” confidently declaring that “this distinction is not a matter of value-preference but of rational criteria.”<sup>393</sup> The “rational criteria” Marcuse speaks of consist of Marxist dogma.<sup>394</sup> Marcuse wrote that, in the American society of his time, “the conditions of tolerance are ‘loaded’: they are determined and defined by the institutionalized inequality” or “by the class structure of society.”<sup>395</sup>

Marcuse presents a pure vision of good leftist liberating tolerance and bad conservative repressive tolerance. “[T]olerance cannot be indiscriminate and equal with respect to the contents of expression, neither in word nor in deed; it cannot protect false words and wrong deeds which demonstrate that they contradict and counteract the possibilities of liberation.”<sup>396</sup> Liberation, of course, is an immensely value-laden concept. Because Marcuse was so convinced of the righteousness of his ideology, he urged that “certain things cannot be said, certain ideas cannot be expressed, certain policies cannot be proposed, certain behavior cannot be permitted without making tolerance an instrument for the continuation of servitude.”<sup>397</sup> Under the conservative status quo, open dialogue does not produce the correct progressive result. In a society that has not accepted the influence of Marxist liberation, “persuasion through discussion and the equal presentation of opposites . . . easily lose their liberating force as factors of understanding and learning.”<sup>398</sup>

The pursuit of egalitarian goals “may justify strongly discriminatory tolerance on political grounds”<sup>399</sup> to include “cancellation of the liberal

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<sup>392</sup> *Id.* at 100–01.

<sup>393</sup> *Id.* at 101.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.* at 84–85.

<sup>396</sup> *Id.* at 88.

<sup>397</sup> *Id.*

<sup>398</sup> *Id.* at 96–97.

<sup>399</sup> *Id.* at 106.

creed of free and equal discussion.”<sup>400</sup> Together with the repression against conservatism, there must be a corresponding “discriminatory tolerance in favor of progressive tendencies.”<sup>401</sup> What Marcuse referred to as “liberating tolerance” would need to replace America’s repressive tolerance. “Liberating tolerance, then, would mean intolerance against movements from the Right, and toleration of movements from the Left.”<sup>402</sup> “As to the scope of this tolerance and intolerance” Marcuse continued, “it would extend to the stage of action as well as of discussion and propaganda, of deed as well as of word.”<sup>403</sup> Censorship of conservatives is integral to the liberation, and the liberation entails group favoritism flowing from group resentments.<sup>404</sup> As Marcuse puts it, “The small and powerless minorities which struggle against the false consciousness and its beneficiaries must be helped.”<sup>405</sup> What better way to demonstrate your concern for an aggrieved minority, than to restrict free expression on their behalf?

“Withdrawal of tolerance from regressive movements *before* they can become active; intolerance even toward thought, opinion, and word, and finally, intolerance in the opposite direction, that is, toward the self-styled conservatives, to the political Right—these anti-democratic notions” are necessary to restore “universal tolerance” according to Marcuse.<sup>406</sup> Marcuse believed that American society in the 1960s was so regressive that tolerance, as it existed then, merely perpetuated injustice.<sup>407</sup> As he put it, “[T]olerance mainly serves the protection and preservation of a repressive society.”<sup>408</sup> Marxist-defined “liberation” and reeducation were the only hope. “[I]n the education of those who are not yet maturely integrated, in the mind of the young, the ground for liberating tolerance is still to be created.”<sup>409</sup> As the communist revolutionaries and bureaucrats

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<sup>400</sup> *Id.*

<sup>401</sup> *Id.* at 107.

<sup>402</sup> *Id.* at 109.

<sup>403</sup> *Id.*

<sup>404</sup> *Id.*

<sup>405</sup> *Id.* at 110.

<sup>406</sup> *Id.* at 110–11.

<sup>407</sup> *Id.* at 110.

<sup>408</sup> *Id.* at 111.

<sup>409</sup> *Id.* at 113.

did before him, Marcuse claimed that “undemocratic means” were justified to achieve a vision of society seen as egalitarian and liberating.<sup>410</sup>

If the thrust of his argument was not clear enough in his 1965 essay, Marcuse published a postscript to *Repressive Tolerance* in 1968.<sup>411</sup> In his postscript, he reiterated his premise that tolerance did not produce the desired ideological outcome, and therefore tolerance is repressive.<sup>412</sup> “Under the conditions prevailing in this country, tolerance does not, and cannot, fulfill the civilizing function attributed to it by the liberal protagonists of democracy, namely, protection of dissent.”<sup>413</sup> According to Marcuse, “[T]he majority is no longer justified in claiming the democratic title of the best guardian of the common interest.”<sup>414</sup> He reiterates support for “the practice of discriminating tolerance in an inverse direction, as a means of shifting the balance between Right and Left by restraining the liberty of the Right, thus counteracting the pervasive inequality of freedom . . . and strengthening the oppressed against the oppressors.”<sup>415</sup> Correct tolerance required “restraining the liberty of the Right.”<sup>416</sup> Once more, Marcuse emphasizes that opposition to the welfare state would need to be met with the force of state coercion.<sup>417</sup> “Such discrimination [in favor of the “oppressed”] would also be applied to movements opposing the extension of social legislation to the poor, weak, and disabled.”<sup>418</sup> A decade after Marcuse’s essay was published, Leslak Kolakowski’s groundbreaking critique *Main Currents of Marxism* would explore the obvious link between *Repressive Tolerance* and totalitarianism.<sup>419</sup>

Kolakowski asserts that Marcuse offers “Marxism without the proletariat,”<sup>420</sup> making elitist demands and elevating his own doctrine above every other principle, a leap of faith and self-righteousness that goes “much further than Soviet totalitarian Communism.”<sup>421</sup> Originally born in

<sup>410</sup> *Id.* at 100.

<sup>411</sup> *Id.* at 117.

<sup>412</sup> *Id.*

<sup>413</sup> *Id.*

<sup>414</sup> *Id.* at 118.

<sup>415</sup> *Id.* at 119–20.

<sup>416</sup> *Id.*

<sup>417</sup> *Id.* at 120–21.

<sup>418</sup> *Id.* at 120.

<sup>419</sup> See generally KOLAKOWSKI, *supra* note 375.

<sup>420</sup> *Id.* at 415.

<sup>421</sup> *Id.* at 419.

Germany, Marcuse immigrated to America after Hitler's rise, and by that time it was manifestly clear that there would be no worldwide working class revolution.<sup>422</sup> In response, Marcuse shifted his revolutionary faith towards "students, racial minorities, and the lumpenproletariat" rather than the working class.<sup>423</sup> Kolakowski observes that, under Marcuse's "[l]iberating tolerance," a group of people who believe they have achieved "higher wisdom" now "are entitled for that reason to use violence, intolerance, and repressive measures against the majority who form the rest of the community."<sup>424</sup> Marcuse was prepared to condemn and censor those who held beliefs that were, in Marcuse's view, regressive.<sup>425</sup> But, Kolakowski asks, "[H]ow do we know which models and normative concepts are the right ones? There is and can be no answer to these questions: we are at the mercy of arbitrary decisions by Marcuse and his followers."<sup>426</sup> Moreover, "Marcuse's system depends on replacing the tyranny of logic by a police tyranny. This is corroborated by all historical experience: there is only one way of making a whole society accept a particular world-view."<sup>427</sup> Marcuse kept alive certain totalitarian characteristics: imposing doctrine while repressing opponent's speech through speech codes.<sup>428</sup> Kolakowski outlined the logical consequence of egalitarian speech regulation: "[I]f freedom of speech does not mean that people can say what they like, but that they must say the right thing; and if Marcuse and his followers have the sole right to decide what people must choose and what they must say," then this vision "can only be realized in the form of a totalitarian state, established and governed by force."<sup>429</sup>

Marcuse's call for the "extreme suspension of the right of free speech and free assembly"<sup>430</sup> demonstrates an unmistakable attachment between mainstream American left-wing thought and the prior legacy of Marxist ideology. Marcuse sees group grievances as a virtue; he wishes that "militantly intolerant" minorities would lead a righteous "struggle."<sup>431</sup> A

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<sup>422</sup> *Id.* at 396–97.

<sup>423</sup> *Id.* at 375.

<sup>424</sup> *Id.* at 412–13, 416.

<sup>425</sup> *Id.* at 420.

<sup>426</sup> *Id.* at 416.

<sup>427</sup> *Id.* at 418.

<sup>428</sup> *Id.* at 418–19.

<sup>429</sup> *Id.* at 418.

<sup>430</sup> Marcuse, *supra* note 12, at 109.

<sup>431</sup> *Id.* at 123.

sense of victimhood is entirely justified given the “servitude”<sup>432</sup> of the minorities who are “left harmless and helpless in the face of the overwhelming majority.”<sup>433</sup> The will to impose doctrine should result in “discriminatory tolerance in favor of progressive tendencies,”<sup>434</sup> while the elite eagerly await an opportunity to shape “the mind of the young, [where] the ground for liberating tolerance is still to be created.”<sup>435</sup> In “restraining the liberty of the Right,”<sup>436</sup> the desire to persecute opposing viewpoints could not be more evident. A totalitarian state is presupposed in the “extreme suspension of the right of free speech and free assembly”<sup>437</sup> as well as the “undemocratic means” that must be institutionalized.<sup>438</sup> Marcuse’s “liberating tolerance” has explicitly Marxist origins and a blatantly totalitarian prescription.<sup>439</sup>

### C. Leftist Bias Undermines Critical Inquiry

The entrenchment of leftist doctrine described above will impact critical inquiry into hate speech regulation, as well as impacting historical inquiry into totalitarian communist regimes more broadly. Critical inquiry will inevitably be burdened by longstanding ideological bias.<sup>440</sup> Whether this bias manifests itself in political correctness, critical race theory, cultural Marxism, or liberating tolerance, the impact on critical inquiry is significant. The modern university has, for decades, been the source of

<sup>432</sup> *Id.* at 88.

<sup>433</sup> *Id.* at 94.

<sup>434</sup> *Id.* at 107.

<sup>435</sup> *Id.* at 113.

<sup>436</sup> *Id.* at 119–20.

<sup>437</sup> *Id.* at 109.

<sup>438</sup> *Id.* at 100.

<sup>439</sup> *Id.* at 85.

<sup>440</sup> REINHOLD NIEBUHR, REINHOLD NIEBUHR ON POLITICS 44 (Harry R. Davis & Robert C. Good eds., 1960) (“While the ideological taint upon all social judgments is most apparent in the practical conflicts of politics, it is equally discernible, upon close scrutiny, in even the most scientific observations of social scientists.”); Seymour Martin Lipset & Everett Carll Ladd, Jr., *The Politics of American Sociologists*, 78 AM. J. SOC. 67, 86–87 (1972) (“[The] evidence definitely suggests that there is a much higher proportion of radicals among sociologists than among any other occupation group.”).

calls for censorship.<sup>441</sup> In the 1990s, Arthur Schlesinger, Jr. lamented, “[T]he rising demand for repression and censorship is centered in our universities—the places above all where unlimited freedom of expression had previously been deemed sacred.”<sup>442</sup> The outcome of entrenched doctrine is a corrupted form of inquiry, where vital questions are never asked—questions such as the following: What are the origins of hate speech regulation? David Sidorsky, a philosophy professor, noted, “Since the great majority of the faculty share the liberal or radical political views and values identified as politically correct, there is no felt need to rise to the defense of the nonconformist on grounds of principle.”<sup>443</sup> Under existing conditions on campus, groupthink is solidified and the life of the mind is limited, not to mention the negative impact on research and social inquiry. As Allan Bloom observed forty years ago, “Any research, however dispassionate, which might tend to reveal differences among nations, races, or sexes which are counter to the prevailing dogma is risky indeed to the scholar.”<sup>444</sup> Liberal academic bias is now so evident that the *New York Times* has even taken notice.<sup>445</sup> Leftist ideological bias is similarly ingrained in law school faculty, viewed in the aggregate.<sup>446</sup> This

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<sup>441</sup> See Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987, 2013–14 (2017) (chronicling instances over time where universities have sought to control free expression on campuses).

<sup>442</sup> SCHLESINGER, *supra* note 92, at 153–54.

<sup>443</sup> David Sidorsky, *Multiculturalism and the University, in OUR COUNTRY, OUR CULTURE: THE POLITICS OF POLITICAL CORRECTNESS*, *supra* note 1, at 244, 253.

<sup>444</sup> Allan Bloom, *The Failure of the University*, 1103 DAEDALUS 58, 64 (1974).

<sup>445</sup> Patricia Cohen, ‘Culture of Poverty’ Makes a Comeback, N.Y. TIMES (Oct. 17, 2010), <http://www.nytimes.com/2010/10/18/us/18poverty.html> [https://perma.cc/6S3P-LFVZ] (reporting that for the last several decades “in the overwhelmingly liberal ranks of academic sociology and anthropology the word ‘culture’ became a live grenade, and the idea that attitudes and behavior patterns kept people poor was shunned”); John Tierney, *Social Scientist Sees Bias Within*, N.Y. TIMES (Feb. 7, 2011), <http://www.nytimes.com/2011/02/08/science/08tier.html> [https://perma.cc/37NV-T3GK] (reporting on research finding a “hostile climate” created by social scientists towards non-liberals).

<sup>446</sup> See, e.g., John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1177 (2005) (discussing overwhelmingly liberal political campaign contributions of law professors); Jennifer Pohlman, *Law Schools Hiring Liberal Educators*, 20 NAT'L JURIST 14, 14–15 (2010) (noting the large imbalance between liberal and conservative faculty hires); Adam Liptak, *If the Law is an Ass, the Law Professor is a Donkey*, N.Y. TIMES (Aug. 28, 2005), (*continued*)

bias will not self-correct, because the bias entrenches privileged viewpoints and status positions within the academy. As Milosz pointed out, “Orthodoxy cannot release its pressure on men’s minds; it would no longer be an orthodoxy.”<sup>447</sup>

Concerns about academic bias have a strong basis in fact, as ideological bias is proven to degrade intellectual inquiry. Ideological commitments restrict the range of policy options allowed in public debate, and “sociopolitical biases influence the questions asked, the research methods selected, the interpretation of research results, the peer review process, judgments about research quality, and decisions about whether to use research in policy advocacy.”<sup>448</sup> Worst of all, many academics are willing to engage in discrimination in order to maintain the hegemony of liberal doctrine.<sup>449</sup> Inbar and Lammers, based on their sample of 800 social psychologists, found that a dismaying number of respondents openly admitted they would discriminate against conservatives in hiring decisions, distributing grants, and reviewing papers.<sup>450</sup> Discrimination is no surprise given that one quarter of sociologists identify as Marxist,<sup>451</sup> a school of thought which employed unrivaled force to institute a rigid ideology and eliminate those who stood in the way. Ultimately, academic discourse about social problems influences society, especially the behavior of

<http://www.nytimes.com/2005/08/28/weekinreview/28liptak.html> [<https://perma.cc/XH4H-ZFFD>] (quoting liberal law professors acknowledging the prevalence of liberalism among faculty); HEATHER MACDONALD, THE BURDEN OF BAD IDEAS: HOW MODERN INTELLECTUALS MISSHAPE OUR SOCIETY 74 (Ivan R. Dee, 2000) (observing that among law school faculty “race and feminist theory have achieved their position of dominance with little argument: their practitioners wear the impregnable mantle of victimhood”).

<sup>447</sup> MILOSZ, *supra* note 157, at 219.

<sup>448</sup> Richard E. Redding, *Sociopolitical Diversity in Psychology*, 56 AM. PSYCHOL. 205, 206 (2001) (citing numerous studies finding that ideological bias affects research and undermines independent intellectual inquiry); Maria Konnikova, *Is Social Psychology Biased Against Republicans?*, NEW YORKER, Oct. 30, 2014, <http://www.newyorker.com/science/maria-konnikova/social-psychology-biased-republicans> [<http://perma.cc/86RP-CTH7>] (same).

<sup>449</sup> John T. Bennett, *The Harm in Hate Speech: A Critique of the Empirical and Legal Bases of Hate Speech Regulation*, 43 HASTINGS CONST. L.Q. 445, 472 (2015).

<sup>450</sup> Yoel Inbar & Joris Lammers, *Political Diversity in Social and Personality Psychology*, 7 PERSP. ON PSYCHOL. SCI. 496, 496, 500-01 (2012).

<sup>451</sup> Gross & Simmons, *supra* note 261, at 40.

impressionable individuals.<sup>452</sup> In fact, the ubiquitous social structure framework promulgated in the social sciences is conditioned by 1960s-era leftist academic ideology.<sup>453</sup> In 1969, anthropologist Walter B. Miller warned, “[T]his ideology has assumed the quality of the sacred dogma of a cult movement and has become so deeply and unconsciously ingrained as to critically restrict consideration of policy options.”<sup>454</sup> Recently, renowned sociologist Orlando Patterson blamed the orthodox structural doctrine for the explanatory shortcomings of contemporary social science:

The main cause for this shortcoming is a deep-seated dogma that has prevailed in social science and policy circles since the mid-1960’s: the rejection of any explanation that invokes a group’s cultural attributes—its distinctive attitudes, values and predispositions, and the resulting behavior of its members—and the relentless preference for relying on structural factors like low incomes, joblessness, poor schools and bad housing.<sup>455</sup>

That “relentless preference” for rigid structural explanations of human behavior is, of course, the persistent intellectual residue of Marxism. Under Soviet doctrine, the rule for social analysis was simple: “Nothing must ever go beyond the description of man’s behavior as a member of a social group.”<sup>456</sup> Communism itself provides an object lesson in the persistence of doctrine in the face of contrary evidence.<sup>457</sup> “Communist ideals persist” into the twentieth century, Hollander notes, “because it is always easier to retain familiar, deeply internalized beliefs held over long

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<sup>452</sup> NATHAN GLAZER, THE LIMITS OF SOCIAL POLICY 15 (Harvard Univ. Press 1988) (remarking that young delinquents internalize and repeat the explanations and excuses propounded by sociologists and social workers to rationalize their harmful behavior).

<sup>453</sup> See, e.g., Walter B. Miller, *The Elimination of the American Lower Class as National Policy: A Critique of the Ideology of the Poverty Movement of the 1960s*, in ON UNDERSTANDING POVERTY: PERSPECTIVES FROM THE SOCIAL SCIENCES, 260, 263–64 (Daniel P. Moynihan ed., 1969).

<sup>454</sup> *Id.* at 263.

<sup>455</sup> Orlando Patterson, Opinion, *A Poverty of the Mind*, N.Y. TIMES (Mar. 26, 2006), <http://www.nytimes.com/2006/03/26/opinion/26patterson.html?pagewanted=all> [https://perma.cc/UG67-78KK].

<sup>456</sup> MILOSZ, *supra* note 157, at 215.

<sup>457</sup> Hollander, *supra* note 125, at 21–22.

periods of time than to radically revise or discard them.”<sup>458</sup> Precious few academics and intellectuals have ventured to publicly admit that liberal orthodoxy stifles intellectual inquiry and constricts policy research.<sup>459</sup> The public, for their part, notice academic biases.<sup>460</sup> In one of the rare surveys to ask about such matters, Gross and Simmons report that “68.2 percent [of respondents] agree that colleges and universities tend to favor professors who hold liberal social and political views,” while “37.5 percent of respondents claim that political bias is a very serious problem” in the classroom.<sup>461</sup> Nearly half of students report that professors express their personal opinions about political matters in the classroom.<sup>462</sup> Academic

<sup>458</sup> *Id.* at 22.

<sup>459</sup> The researchers and academics at the website Heterodox Academy are rare exceptions. HETERODOX ACADEMY, <http://heterodoxacademy.org> [<https://perma.cc/C2CC-P8DE>]. See also FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 7 (1981) (noting that, among criminologists, “[r]esearch into such fundamental problems as the deterrent efficacy of penal sanctions was avoided and even scorned. . . . [S]trikingly . . . illustrat[ing] how an ideology ensconced in an academic discipline may dictate what questions are to be investigated”); THEODORE DALRYMPLE, LIFE AT THE BOTTOM: THE WORLDVIEW THAT MAKES THE UNDERCLASS, at xi-xii (2001) (“[M]ost of the social pathology exhibited by the underclass has its origin in ideas that have filtered down from the intelligentsia. . . . The climate of moral, cultural, and intellectual relativism—a relativism that began as a mere fashionable plaything for intellectuals—has been successfully communicated to those least able to resist its devastating practical effects.”).

<sup>460</sup> Bennett, *supra* note 449, at 472.

<sup>461</sup> Neil Gross & Solon Simmons, *Americans’ Views of Political Bias in the Academy and Academic Freedom* 11, 19, 24 (Harv. Univ. and Geo. Mason Univ., Working Paper, May 22, 2006) (“61.8 percent agree that too many professors are distracted by disputes over issues like sexual harassment and the politics of ethnic groups.”) The authors conclude that “a significant minority believe that colleges and universities are havens for liberals and ‘radicals,’ that conservative professors do not get a fair shake, and that professors are too distracted by identity politics.”).

<sup>462</sup> 46% of students at U.S. News’s top 50 colleges and universities report that professors put forward their personal ideologies in the classroom, and 42% complain that course materials present just one side of controversial public issues. CTR. FOR SURVEY RESEARCH & ANALYSIS AT THE UNIV. OF CONN., POLITICS IN THE CLASSROOM: A SURVEY OF STUDENTS AT THE TOP 50 COLLEGES & UNIVERSITIES 2 (Oct. 2004), [https://www.goacta.org/images/download/politics\\_in\\_the\\_classroom.pdf](https://www.goacta.org/images/download/politics_in_the_classroom.pdf) [<https://perma.cc/72KW-9T7M>].

bias is relevant to hate speech regulation because biased social science<sup>463</sup> combines with the Marxist approach to free speech to form the rationale for hate speech regulation. At the same time, critical questions about the origins of hate speech regulation are rarely posed, as the hegemonic liberal ideology protects itself from scrutiny.

Parts III–V surveyed the bloody pinnacle of communism's achievements, along with the hidden, overlooked, and sometimes-suppressed history of communist speech regulation, a history overlooked due to bias within the academy. The very academics that should be dispassionately analyzing and teaching about communism have a vested interest in whitewashing Marxist thought and the consequences of communism. Many academics perpetuate Marxist or quasi-Marxist modes of analysis, and advocate for hate speech regulation without full consideration of the ideological origins or likely outcome of such policy.<sup>464</sup> Next, Part VI fleshes out the link between totalitarian communism and hate speech regulation. What bearing does communism's violent history have on hate speech regulation today? In short, communist regimes are the only historical parallel for the current movement to suppress speech. Five important factors are present in leftist political culture today: intense group grievances, a sense of victimhood, the desire to impose doctrine, to persecute opposing viewpoints, and to empower the state to limit speech. Totalitarian communist regimes shared this woeful set of factors.<sup>465</sup> This is no coincidence; demands for hate speech regulation today emerge from the very same ideological lineage. These factors together are ordinarily referred to as political correctness, and political correctness is in fact the conceptual sinew connecting totalitarian communism to hate speech regulation.

## VI. POLITICAL CORRECTNESS AND THE ORIGINS OF MODERN HATE SPEECH REGULATION

Political correctness is the most visible conceptual sinew linking hate speech regulation to totalitarian communist rule. Ronald Radosh, historian and former Marxist, believes that “[f]or many members of the former Marxist left, the death of Communism has been replaced equally fervidly with advocacy of the new PC.”<sup>466</sup> Political correctness is of demonstrably

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<sup>463</sup> Bennett, *supra* note 449, at 445, 519.

<sup>464</sup> *Id.* at 445.

<sup>465</sup> Marcuse, *supra* note 12, at 88, 94, 106–07, 109–110, 123.

<sup>466</sup> Radosh, *supra* note 2, at 205.

totalitarian origins.<sup>467</sup> It is quite illuminating to consider what Nisbet designates as the distinguishing feature of totalitarian states, which is “the never-ceasing invasion of the traditional social order by the political—through education, persuasion, propaganda, bribery, and other means of thought control including terror.”<sup>468</sup> “[T]he heart of the totalitarian process is the relentless politicization of culture and society, the conversion, so far as possible, of social roles and relationships into ones of political significance.”<sup>469</sup> Nisbet’s description of the totalitarian system is, unfortunately, an apt summary of modern society. In a constant process of “relentless politicization,” race, gender, class, sexual orientation, and national identities are increasingly imbued with political significance. In one vision of society, the supposed interests and purported feelings of identity groups are the *sine qua non* of scholarly analysis and social morality. “[T]he heart of the totalitarian process,” as defined by Nisbet,<sup>470</sup> circulates through political correctness. Hate speech regulation is in turn the use of naked state power to compel doctrinal compliance, marking an unprecedented “invasion of the traditional social order” by authorities in order to enforce an ideology. Hate speech regulation heralds the culmination of long-standing totalitarian tendencies within the American left.

#### *A. The Totalitarian Origins of Political Correctness*

As distinguished novelist Doris Lessing wrote, “Political correctness is the natural continuum from the party line. What we are seeing once again is a self-appointed group of vigilantes imposing their views on others. It is a heritage of communism, but they don’t seem to see this.”<sup>471</sup> Several intrepid scholars within the humanities and social sciences attribute the origins of political correctness to communism.<sup>472</sup> “[S]ome of the qualities and attributes that characterized the cultural life of the age of

<sup>467</sup> *Id.* at 205–06.

<sup>468</sup> Nisbet, *supra* note 156, at 191.

<sup>469</sup> *Id.* at 203–04.

<sup>470</sup> *Id.* at 203.

<sup>471</sup> E. Jane Dickson, *City of the Mind*, SUNDAY TIMES, May 10, 1992, § 7, at 7 (quoting Doris Lessing).

<sup>472</sup> Robert Brustein, *Dumbocracy in America*, in OUR COUNTRY, OUR CULTURE: THE POLITICS OF POLITICAL CORRECTNESS, *supra* note 1, at 25, 26 (“PC has crypto-Maoist roots, and, in extreme form, is dedicated to a program not unlike that of the unlamented cultural revolution by the People’s Republic of China . . .”).

totalitarianism linger on and remain with us yet, in modulated, mitigated or attenuated forms, a kind of soft totalitarianism,” writes Marcus.<sup>473</sup> According to Lehman, “Leninists used [the phrase ‘political correctness’] approvingly to indicate proper party-line behavior.”<sup>474</sup> In the *Oxford English Dictionary* (OED), the first mention of the concept of political correctness comes from Leon Trotsky’s pen: “The party will utilize quite differently the discontentment of the masses, if it considers it by reckoning with a correct political perspective.”<sup>475</sup> In 1950, Liu Shao-Chi, one of China’s foremost communist revolutionary leaders, wrote, “Our Party’s correct political line cannot be separated from its correct organizational [sic] line.”<sup>476</sup> The concept of political correctness was a unique feature of communism, reflecting a rigid belief in ideological righteousness.<sup>477</sup> “Another essential idea is the Marxist dogma that there is only one ‘correct’ line of thought and action . . . [t]he central authorities define what is correct, and . . . the entire mass membership of any organization is expected to think and act ‘correctly,’” according to Doak Barnett.<sup>478</sup> No less an authority than Mao Tse-Tung wrote, “The failure of the Party’s leading bodies . . . to educate the members along the correct line is also an important cause of the existence and growth of such incorrect ideas.”<sup>479</sup> In 1955, journalism professor Frederick T.C. Yu observed that, within communist societies, “[w]hen professors and scholars praise the ‘correctness’ . . . of Marxism-Leninism, the communists hope that the common people will be more inclined to accept the new ideology.”<sup>480</sup> In 1957, the *New Republic* described the Inquisitorial character of communist doctrine: “The group is also fortified by . . . an absolute doctrinal authority

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<sup>473</sup> Steven Marcus, *Soft Totalitarianism*, in OUR COUNTRY, OUR CULTURE: THE POLITICS OF POLITICAL CORRECTNESS, *supra* note 1, at 155.

<sup>474</sup> Lehman, *supra* note 257, at 111.

<sup>475</sup> 3 OXFORD ENGLISH DICTIONARY ADDITIONS SERIES 101 (John Simpson & Michael Proffitt eds., 1997) [hereinafter OED] (quoting LEON TROTSKY, PROBLEMS OF THE CHINESE REVOLUTION 198 (Max Shactman trans., 1932)).

<sup>476</sup> *Id.* (quoting LIU SHAO-CHI, ON THE PARTY 52 (1950)).

<sup>477</sup> Dickson, *supra* note 471, § 7, at 7.

<sup>478</sup> OED, *supra* note 475, at 101 (quoting Doak Barnett, *Mass Political Organizations in Communist China*, 277 ANN. AMER. ACAD. POL. & SOC. SCI. 76, 80 (1951)).

<sup>479</sup> *Id.* (quoting MAO TSE-TUNG, ON THE RECTIFICATION OF INCORRECT IDEAS IN THE PARTY 1 (1953)).

<sup>480</sup> *Id.* at 102 (quoting FREDERICK T.C. YU, STRATEGY & TACTICS OF CHINESE COMMUNIST PROPAGANDA, at vi, 59 (1955)).

for the ‘correctness’ of all of its solutions.”<sup>481</sup> Cheng’s memoir movingly recounts the innocent Chinese people jailed, tortured and forced to “assume a correct attitude towards the Great Proletarian Cultural Revolution.”<sup>482</sup> As the *Oxford English Dictionary* shows, from the 1970s onward, usage of “political correctness” expanded to describe a broader range of political topics from the American domestic scene.<sup>483</sup> The OED defines “politically correct” in the following manner:

politically correct *adj. phr.*, (*a*) [not as a fixed collocation in early use] appropriate to the prevailing political or social circumstances. . . . (*b*) from the early 1970s, *spec.* conforming to a body of liberal or radical opinion, esp. on social matters, characterized by the advocacy of approved causes or views, and often by the rejection of language, behaviour, etc., considered discriminatory or offensive; also *absol.* See \*CORRECT *a.* 4. (orig. *U.S.*, sometimes *dismissive*).<sup>484</sup>

The orthodox demand to conform “to a body of liberal or radical opinion” is in keeping with the singular doctrinal origins of political correctness.

Today, political correctness “has seized academic power and has come to dominate large sections of university life and to intimidate the rest of the faculty and the administrators,” according to English professor William Phillips.<sup>485</sup> In this milieu of leftist hegemony, Lukianoff and Haidt observe, “[T]he ideas, values, and speech of the other side are seen not just as wrong but as willfully aggressive toward innocent victims.”<sup>486</sup> It should come as no surprise that an ideologically homogenous academy, infused with a severe sense of grievance and posture of victimhood, has come to call for speech regulation. As Justice Oliver Wendell Holmes warned, official suppression of free expression is “perfectly logical.”<sup>487</sup> Totalitarian movements have an insatiable taste for colonizing the provinces of

<sup>481</sup> *Id.* (quoting Dr. Robert J. Lifton, *Brainwashing in Perspective*, NEW REPUBLIC, MAY 13, 1957, at 21, 24).

<sup>482</sup> See CHENG, *supra* note 71, at 369.

<sup>483</sup> OED, *supra* note 475, at 335.

<sup>484</sup> *Id.*

<sup>485</sup> William Phillips, *Against Political Correctness: Eleven Points, in OUR COUNTRY, OUR CULTURE: THE POLITICS OF POLITICAL CORRECTNESS*, *supra* note 1, at 195, 196.

<sup>486</sup> Lukianoff & Haidt, *supra* note 96.

<sup>487</sup> Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

thought, and communist regimes prove especially adept at controlling the realm of expression.<sup>488</sup> Today, the growing impulse to impose left-wing orthodoxy through hate speech regulation is slowly attracting alarmed comment, even from liberal circles.<sup>489</sup> Contemporary calls to punish hate speech are the “perfectly logical” persecutions Justice Holmes warned of. Of deep concern, these persecutions are driven today by a troubling set of factors. Particular cultural traits and institutional mechanisms solidify a connection between hate speech regulation and twentieth-century communism.<sup>490</sup> Specifically, the cultural traits are group grievances, the victim mentality, and the desire to impose doctrine and to persecute opponents’ speech.<sup>491</sup> The necessary institutional mechanism is a governmental authority empowered to restrict speech.<sup>492</sup> While these factors are present to some degree within virtually all societies, the emotional intensity of these traits varies widely from one society to another. The size of the population possessing these traits also varies. Fortunately, for the sake of social cohesion and free inquiry, this set of factors is rarely present in modern societies at the same time among a significant part of the population—with communist regimes the exception.<sup>493</sup> However, these factors are now present to an intense degree among a growing subset of the population—especially current campus activists and their official enablers.

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<sup>488</sup> LEYS, *supra* note 113, at 34–35 (“Those who harbor a certain nostalgia for totalitarianism and unconsciously regret the passing away of the Inquisition and the Pope’s Zouaves will find in Maoist China the incarnation of a medieval dream, where institutionalized Truth has again a strong secular arm to impose dogma, stifle heresy, and uproot immorality.”).

<sup>489</sup> See, e.g., Haidt & Lukianoff, *supra* note 96, at 158–59; KIRSTEN POWERS, THE SILENCING: HOW THE LEFT IS KILLING FREE SPEECH, at xiii–xiv (2015) (liberal pundit asserting that an “alarming level of intolerance emanates from the left side of the political spectrum” and criticizing “aggressive, illiberal impulse to silence people”). See also Alex Morey, President Barack Obama Echoes FIRE: College Student Shouldn’t Be ‘Coddled and Protected from Different Points of View’, FIRE (Sept. 15, 2015), [https://www.thefire.org/transcr\\_ipt-president-obama-echoes-fire-college-students-shouldnt-be-coddled-and-protected-from-different-points-of-view/](https://www.thefire.org/transcr_ipt-president-obama-echoes-fire-college-students-shouldnt-be-coddled-and-protected-from-different-points-of-view/) [https://perma.cc/H688-HKRQ].

<sup>490</sup> Bennett, *supra* note 449, at 524.

<sup>491</sup> *Id.* at 467, 517, 534.

<sup>492</sup> LEYS, *supra* note 113, at 47.

<sup>493</sup> Hollander, *supra* note 125, at 16.

One of the key common traits shared by communism and the contemporary left is a sense of victimhood. Leszek Kolakowski observed that the Bolsheviks seized power “under slogans that appealed to and incited envy as the driving revolutionary force.”<sup>494</sup> Speaking of modern society, humanities scholar Steven Marcus notes, “What moves large numbers—if not all—of those who adhere to soft totalitarian convictions is first a shared sense of victimhood.”<sup>495</sup> The college activists share this trait with the original Marxists. “This vision of a stark and simple dualism in the universe, this science of victimology, is one thing that Marxism has to offer” contemporary society, according to literary critic and poet David Lehman.<sup>496</sup> The sense of victimhood, combined with the other factors discussed above, are often referred to together as political correctness.

Political correctness is the conceptual sinew connecting Marxist ideology to hate speech regulation. Political correctness could easily be imposed by force of law wherever hate speech regulation is enacted.<sup>497</sup> Simply witness the dreadful state of discourse at American universities.<sup>498</sup>

<sup>494</sup> Kolakowski, *supra* note 175, at 125.

<sup>495</sup> Marcus, *supra* note 473, at 157.

<sup>496</sup> Lehman, *supra* note 257, at 111, 113.

<sup>497</sup> Sherry, *supra* note 43, at 941–42.

<sup>498</sup> After the Yale Intercultural Affairs Committee warned students against wearing “culturally unaware and insensitive” Halloween costumes, Yale lecturer Erika Christakis responded by asking in an email, “Is there no room anymore for a child or young person to be a little bit obnoxious . . . a little bit inappropriate or provocative or, yes, offensive? . . . [I]t seems [American universities] have become places of censure and prohibition.” As if to prove her point, she and her husband were targeted for condemnation, and each subsequently announced that they would step down from their teaching positions temporarily. Liam Stack, *Yale’s Halloween Advice Stokes a Racially Charged Debate*, N.Y. TIMES (Nov. 8, 2015), <http://www.nytimes.com/2015/11/09/nyregion/yale-culturally-insensitive-halloween-costumes-free-speech.html> [<https://perma.cc/MY76-RPZN>]. See also Jillian Lanney & Carolynn Cong, *Ray Kelly Lecture Canceled Amidst Student, Community Protest*, BROWN DAILY HERALD (Oct. 30, 2013), <http://www.browndailyherald.com/2013/10/30/ray-kelly-lecture-canceled-amidst-student-community-protest/> [<https://perma.cc/H9QG-9F7Y>]. Neither the Vice President for Campus Life and Student Services nor the Vice President for Public Affairs and University Relations could protect a guest speaker from hostile student protesters, who prevented the lecture. *Id.* See also Edward Schlosser, *I’m a Liberal Professor, and My Liberal Students Terrify Me*, VOX, (June 3, 2015), <http://www.vox.com/2015/6/3/8706323/college-professor-afraid> [<https://perma.cc/Y6QY-P2GR>] (“I am frightened sometimes by the thought that a (continued)

Abuses of power are essentially built into official speech restriction. As Doris Lessing states, “The most powerful mental tyranny in what we call the free world is Political Correctness, which is both immediately evident, and to be seen everywhere, and as invisible as a kind of poison gas, for its influences are often far from the source, manifesting as a general intolerance.”<sup>499</sup> Political correctness was a critical component of the ideological enforcement mechanism within communist regimes; there was an officially approved manner of viewing the world, and any deviation from that doctrine was cause for censure, ostracism, or punishment.<sup>500</sup> Communist regimes displayed an uncanny ability to control expression and crush dissent by punishing speech.<sup>501</sup> Communist regimes benefitted most, however, by chilling speech.<sup>502</sup> Thoughtful people internalized “the limits of the possible”<sup>503</sup> range of discourse, and spoke accordingly. Importantly, the historical record reveals that the most debilitating—and degrading—censorship was the self-imposed kind.<sup>504</sup> Under communist regimes, self-censorship was the most corrosive influence on free thought and free speech.<sup>505</sup> Today, the chilling effect is imparted and socialized through political correctness. Political correctness insinuates leftist doctrine, of explicitly Marxist origin, into norms of discourse, scholarly inquiry, and everyday conduct. Political correctness is therefore a legacy of totalitarianism and a means of enforcing doctrine while suppressing dissent and critical thought.

Arthur Schlesinger, Jr. asserts, “Obviously, ‘political correctness’ is a strategy of intimidation in the struggle for intellectual and educational power.”<sup>506</sup> The ideological origins of hate speech regulation can illuminate the interests and values underlying the struggle for power Schlesinger

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student would complain . . . of not being sensitive enough toward his feelings, of some simple act of indelicacy that's considered tantamount to physical assault,” and “[i]n this type of environment, boat-rocking isn't just dangerous, it's suicidal, and so teachers limit their lessons to things they know won't upset anybody.”).

<sup>499</sup> Doris Lessing, *Censorship*, in TIME BITES: VIEWS AND REVIEWS 72, 76 (Harper Collins Pub. 1st ed., 2004).

<sup>500</sup> Kolakowski, *supra* note 175, at 129.

<sup>501</sup> BROWN, *supra* note 127, at 575.

<sup>502</sup> *Id.*

<sup>503</sup> *Id.*

<sup>504</sup> *Id.*

<sup>505</sup> *Id.*

<sup>506</sup> Schlesinger, *supra* note 1, at 225.

described. Regardless of their conscious beliefs about totalitarian systems, proponents of hate speech regulation are seeking to wield a legal weapon with vast political, ideological, and cultural consequences—a weapon whose lineage is violent and dismal. This analysis has practical application, and three such applications are explored below. First, hate speech regulation itself should be reinterpreted as a doctrinal enforcement mechanism. Second, the policing of so-called “microaggressions” deserves scrutiny. Third, the enactment of mandatory sensitivity training calls for skepticism. Instead of viewing each policy as an enlightened measure to promote equality, we can now reassess these measures as doctrinal enforcement mechanisms: products of Marxism with a disturbing intellectual lineage, a bloody past, and awful consequences for free inquiry and freedom of expression.

#### *B. Hate Speech Regulation as a Doctrinal Enforcement Mechanism*

Hate speech regulation functions as a doctrinal enforcement mechanism by overtly dictating approved speech, directly imposing doctrine, and chilling speech. Hate speech regulation directly enforces orthodoxy, while political correctness indirectly impacts free society through emotional manipulation, peer pressure, and engineering social norms. Political correctness seriously affects institutions by changing the parameters of accepted debate and obligating institutions to pressure the individuals within them to restrict their expression within the allotted parameters. Hate speech regulation, meanwhile, functions as an overt institutional mechanism for imposing orthodoxy and limiting free expression. The cognitive impact of hate speech regulation will be to deter expression of officially disapproved opinions or chill speech concerning officially disfavored topics. Within universities, the adoption of hate speech regulation marks the shift from left-wing hegemony to left-wing dominance. Hate speech regulation weds doctrine to state power. Serge wrote of the dangers of doctrine wedded to state power:

Whatever may be the scientific value of a doctrine, from the moment that it becomes governmental, interests of State will cease to allow it the possibility of impartial inquiry; and its scientific certitude will even lead it, first to intrude into education, and then, by the methods of guided

thought, which is the same as suppressed thought, to exempt itself from criticism.<sup>507</sup>

Persecution is perfectly logical, when one has official power at their disposal.

Kathryn Abrams, a law professor, asserts, “[W]e need limits on free expression in intellectual life” in order to promote “respect for and recognition of politically marginalized groups.”<sup>508</sup> As a rationale for speech regulation, “respect for and recognition of politically marginalized groups” is a nebulous, utopian goal. In fact, this goal is as nebulous, utopian, and conducive to government repression as “fairness” or “equality.” It should come as no surprise that today’s multicultural leftist shares with the totalitarian Marxist a desire to restrict speech. As with other social engineering schemes, hate speech regulation is touted as a progressive policy. Restrictions on speech today are portrayed as an effort to defend certain groups from the supposed harms of hate speech.

The harms stemming from hate speech supposedly include “feelings of humiliation, isolation, and self-hatred,” as well as “dignitary affront.”<sup>509</sup> It would take a dangerous degree of faith in state authority to believe that a judicial or political body could adjudicate such criteria. There are

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<sup>507</sup> SERGE, *supra* note 17, at 375. The paramount modern example of state power reinforcing ideological doctrine occurred at an Ontario university, where a teaching assistant named Lindsey Shepherd showed her class a video clip from a televised debate over gender pronoun usage. The video clip came from a popular mainstream Canadian public broadcasting program and featured two academics civilly discussing the issue of pronoun usage and free speech. For showing this video clip to her class, Shepherd was consequently hauled before a university tribunal and accused with some degree of plausibility of violating Canadian law. The tribunal likened her to “neutrally playing a speech by Hitler.” She was also accused of creating a “toxic climate.” The incident was extensively reported, but only because Shepherd wisely recorded the tribunal, and could provide audio proof of the proceeding that school officials subjected her to. See, e.g., Brian Platt, *What the Wilfrid Laurier Professors Got Wrong About Bill C-16 and Gender Identity Discrimination*, NAT’L POST (Nov. 20, 2017), <http://nationalpost.com/news/politics/what-the-wilfrid-laurier-professors-got-wrong-about-bill-c-16-and-gender-identity-discrimination> [<https://perma.cc/FPD4-8K8D>].

<sup>508</sup> Kathryn Abrams, *Creeping Absolutism and Moral Impoverishment: The Case for Limits on Free Expression*, in THE LIMITS OF EXPRESSION IN AMERICAN INTELLECTUAL LIFE, No. 22 (American Council of Learned Societies, Occasional Paper No. 22, 1993), [http://archives.acls.org/op/22\\_Limits\\_of\\_Expression.htm](http://archives.acls.org/op/22_Limits_of_Expression.htm) [<https://perma.cc/28J4-8NQL>].

<sup>509</sup> Delgado, *supra* note 103, at 137, 143.

extremely divergent perspectives on the harms of racism and hate speech in modern society, the meaning and sources of racial inequality, and the solutions to these vexations.<sup>510</sup> Speech regulation proposals reduce these complicated questions to a cartoonish condemnation of American society. Who among us has met someone so wise that they could distinguish between protecting a group from “hate” and protecting a group from criticism? Political activists and other biased decisionmakers will not draw this distinction on a principled, consistent, or rational basis. The effort to distinguish “hate” from criticism, as the experience of other Western nations shows, is fraught with difficulty.<sup>511</sup> For instance, Dutch politician Geert Wilders was prosecuted—it is commonly believed—for “inciting hatred and discrimination against Muslims” based on critical remarks Wilders made about the Koran.<sup>512</sup> However, the basis for the charges against Wilders also included his criticism of immigration policy.<sup>513</sup> After Wilders’ acquittal, an attorney who “represented immigrant and antiracist complainants” against Wilders complained, “It’s normal now to say in the Netherlands that the immigration experiment has failed.”<sup>514</sup> The attorney sought a chilling effect on critical discussion of immigration policy and expected that prosecution would silence any suggestion “that the immigration experiment has failed.” Meanwhile, in England, “the distinction between protecting religious groups from vilification and protecting their beliefs and practices from criticism” has proven to be an

<sup>510</sup> See Brustein, *supra* note 472, at 25.

<sup>511</sup> Robin Edger, *Are Hate Speech Provisions Anti-Democratic?: An International Perspective*, 26 AM. U. INT'L L. REV. 119, 124 n.35 (2010) (describing complaints, hearings, and investigations against conservative Canadian magazines alleging, in part, that an article exposed Muslims “to hatred and contempt, on the basis of their religion”) (citation omitted).

<sup>512</sup> David Jolly, *Dutch Court Acquits the Netherlands: Anti-Islam Politician Muslim Speech Is Found Offensive but Legal*, N.Y. TIMES (June 23, 2011), [http://www.nytimes.com/2011/06/24/world/europe/24dutch.html?\\_r=0](http://www.nytimes.com/2011/06/24/world/europe/24dutch.html?_r=0) [https://perma.cc/MWD3-TSSU].

<sup>513</sup> Robert A. Kahn, *Who's the Fascist? Uses of the Nazi Past at the Geert Wilders Trial*, 14 OR. REV. INT'L L. 279, 282 n.18 (2012) (“Wilders was also prosecuted for saying in an interview that if elected he would ‘[close the] borders, [and allow] no more Islamic people coming to the Netherlands.’”) (citing Amsterdam District Court, 23 June, 2011, Public Prosecution # 13/425046-09, at § 4.3.2).

<sup>514</sup> Jolly, *supra* note 512.

elusive distinction.<sup>515</sup> Similarly, U.N. defamation laws threaten to exempt favored religious groups from criticism.<sup>516</sup> To avoid injustices of exactly the sort described above, our First Amendment jurisprudence imbedded a moral imperative for open debate as well as distrust of government speech controls.<sup>517</sup>

“[T]he Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather . . . the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.”<sup>518</sup> Within the American tradition of free speech, the state is removed from the domain of discourse.<sup>519</sup> “[T]he point of all speech protection . . . is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.”<sup>520</sup> Those with zealous commitment to a doctrine will tend to view unbelievers as misguided, hurtful, or “hateful.” Indeed, hate speech regulation can be understood as a policy of silencing speech by characterizing it as “hateful.” The Supreme Court has ruled that, in the course of public debate, we will have to “tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment.”<sup>521</sup> The American tradition of free speech is fundamentally inconsistent with hate speech regulation.<sup>522</sup>

Hate speech regulation is a doctrinal enforcement mechanism, descended from totalitarian communism. Lessing shares an illuminating experience in that regard: “In a certain prestigious university in the United

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<sup>515</sup> Eric Barendt, *Religious Hatred Laws: Protecting Groups or Belief?*, 17 RES PUBLICA 41, 41 (2011).

<sup>516</sup> Brooke Goldstein & Benjamin Ryberg, *The Emerging Face of Lawfare: Legal Maneuvering Designed to Hinder the Exposure of Terrorism and Terror Financing*, 36 FORDHAM INT'L L.J. 634, 651 (2013) (“While preventing religious intolerance is a noble effort in theory, the practical implication of these [proposed U.N.] resolutions is the suppression of legitimate dialogue about real and imminent national security threats and the resurgence of blasphemy codes.”).

<sup>517</sup> *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2010).

<sup>518</sup> *Id.* at 459 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–11 (1975)).

<sup>519</sup> *Id.* at 451–52.

<sup>520</sup> *Id.* at 458 (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995)).

<sup>521</sup> *Id.* (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)).

<sup>522</sup> *Snyder*, 562 U.S. at 458.

States two male faculty members told me they hated PC but did not dare say so, if they wanted to keep their jobs.”<sup>523</sup> Lessing continues, “They took me into the park to say it, where we could not be overheard, as used to happen in the communist countries.”<sup>524</sup> These are the inevitable fruits of doctrinal enforcement. Decades ago, Sherry concluded, “Hate speech regulations are thus explainable only as the use of raw political power to enforce orthodoxy.”<sup>525</sup> On today’s campus and increasingly in liberal public discourse, any perspective opposed to political correctness is demonized. Few would claim that leftist doctrines are impartially analyzed at state-funded schools. Doctrinal enforcement would be ineffective if there were diverse political perspectives vying for influence within the academy.<sup>526</sup> As the academy currently stands, the vast majority of professors are leftists.<sup>527</sup> Moreover, most school administrators appear intimidated in the face of ideological zealotry, refusing to confront the culture of victimhood.<sup>528</sup> These are the ideal circumstances in which activists could exploit authority in order to enforce doctrine. Hate speech regulation is a symptom of the will to impose orthodoxy.

Given the critical mass of academics sympathetic to communist regimes and supportive of the totalitarian enforcement mechanism provided by speech regulation, the campus discussion of free speech now includes numerous voices calling for the repression of free expression. As one legal scholar describes, “In the past 20 years, the American free-speech debate has produced a series of legal narratives based on post-Marxist, post-colonial, post-structuralist ideas that are indispensable to the genuine appraisal of the right to freedom of expression in a democracy.”<sup>529</sup> Many modern scholars would agree that “post-Marxist” ideas are “indispensable to the genuine appraisal of the right to freedom of expression.”<sup>530</sup> But what does it mean to say that post-Marxist ideas are “indispensable” to appraisal of the right to free speech? Post-Marxist ideas are “indispensable” in the

<sup>523</sup> Lessing, *supra* note 499, at 77.

<sup>524</sup> *Id.*

<sup>525</sup> Sherry, *supra* note 43, at 944.

<sup>526</sup> See *supra* note 261 and accompanying text.

<sup>527</sup> See *supra* note 261 and accompanying text.

<sup>528</sup> See *supra* note 261 and accompanying text.

<sup>529</sup> Uladzislau Belavusau, *Instrumentalisation of Freedom of Expression in Postmodern Legal Discourses*, 3 EUR. J. OF LEGAL STUD. 145, 167 (2010).

<sup>530</sup> *Id.* On the influence of Marxism on various “critical” theories, see *supra* Section V.A.

sense that left-wing advocacy is mainstream within academia. Because so many leftist academics call for hate speech regulation, advocacy of totalitarian policy is now commonplace, or—in a manner of speaking—“indispensable.” In other words, with the deck stacked in favor of speech regulation, a false consensus is emerging in favor of speech regulation. Hate speech regulation is an unprecedented and perverse policy. Yet, academic bias is so strong that the perverse policy is treated as natural or normal in today’s university. Such is the power of ideology to redefine values and alter consciousness. The push for speech regulation stems directly from totalitarian communism. The leftist push for speech regulation is facilitated, ideologically and institutionally, by Marxist doctrine and pro-Marxist academics. Proposals for hate speech regulation befit the modern academy, given the heavy influence of Marxist assumptions and frameworks. As Lessing notes, “The submission to the new creed [of political correctness] could not have happened so fast and so thoroughly if communist rigidities had not permeated the educated classes everywhere, for it was not necessary to have been a communist to absorb an imperative to control and limit minds . . .”<sup>531</sup> Hate speech regulation is a doctrinal enforcement mechanism that controls speech directly through the hate speech law and limits speech indirectly through the process of chilling effects.<sup>532</sup> Hate speech regulation will have chilling effects on those who worry about official sanction, which includes most members of civil society. Free speech, as a legal guarantee and social norm, is designed to prevent the chilling effect of censorship.<sup>533</sup> Yet, an influential number of left-wing activists would gladly marshal the chilling effects to serve their own purposes; such persecution is “perfectly logical,” as Justice Holmes noted.<sup>534</sup> In fact, many prominent critical race theorists openly admit that speech regulation regimes are designed to favor specific minority groups.<sup>535</sup>

The strongest evidence that hate speech regulation is a doctrinal enforcement mechanism can be found in the cynical tribalism of some speech regulation schemes. Seminal speech regulation proposals overtly advocate for racial or ideological favoritism.<sup>536</sup> Romero advocates for

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<sup>531</sup> Lessing, *supra* note 499, at 77.

<sup>532</sup> *Id.* at 76.

<sup>533</sup> *Id.* at 75.

<sup>534</sup> Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>535</sup> Delgado, *supra* note 103, at 180 n.275.

<sup>536</sup> *Id.*

blatant differential treatment against whites: “[W]hites should bear the burden of hurtful speech because they are more likely to be protected by the First Amendment than similarly situated nonwhites.”<sup>537</sup> Delgado’s speech regulation proposal “is intended primarily to protect members of racial minority groups traditionally victimized.”<sup>538</sup> Charles Lawrence wrote that the harm of hate speech depends upon “the context of the power relationships within which [the] speech takes place.”<sup>539</sup> These proposals are alarmingly specific in stating that they are intended to benefit minorities by persecuting speech. Liberal advocates of speech regulation routinely express a point of view that compliments totalitarianism, with an added dose of incendiary racial grievance. Because whites are presumed to be privileged, and minorities are deemed relatively less powerful, the harm of hate speech occurs when minorities—but only minorities—complain of victimhood. This explicit racial favoritism presages the farce that would ensue upon the enactment of hate speech regulation.

Hate speech codes on campus also selectively target conservatives. In 1989, Morton Halperin, then-director of the American Civil Liberties Union, stated that he could find “no cases where universities discipline students for views or opinions on the Left, or for racist comments against non-minorities.”<sup>540</sup> Under hate speech laws, free speech is manifestly subordinated to ideological goals. Given the rigid, catechistic intellectual environment, it is unsurprising that a leftist youth cohort has emerged in today’s universities, determined to exploit sensitivities, engender racial guilt, and promulgate speech regulation with the goal of enforcing doctrinal orthodoxy.

Calls for hate speech regulation in modern scholarship are increasingly common. Because of the historical silence discussed in Part IV, calls to regulate hate speech are treated as sensible proposals, no different in nature than proposals for any other ordinary policy. However, the debate over

<sup>537</sup> Romero, *supra* note 104, at 17.

<sup>538</sup> Delgado, *supra* note 103, at 180 n.275.

<sup>539</sup> Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 39 DUKE L.J. 431, 456 (1990). Lawrence’s proposed speech code would not protect “persons . . . vilified on the basis of their membership in dominant majority groups.” *Id.* at 450 n.82.

<sup>540</sup> See Chester E. Finn, *The Campus: “An Island of Repression in a Sea of Freedom”*, COMMENT. (Sept. 1, 1989), <https://www.commentarymagazine.com/articles/the-campus-an-island-of-repression-in-a-sea-of-freedom/> [<https://perma.cc/UA6M-8UTV>] (quoting Morton Halperin).

free speech is supposed to occur on a moral, conceptual, and constitutional plane far above the fray of ordinary political debate. Almost all policy proposals should be up for debate and discussion. There are, however, certain existential questions about who should be allowed to speak and who should be allowed to silence speech. Hate speech regulation conflicts with the most rudimentary precepts of the open society. Hate speech regulation enshrines tribalism in law, deters critical thought, and imposes doctrine. A growing number of academics and student activists on the left believe they have a cause so righteous, grievances so overwhelming, and a government so wise, that now is the time to begin regulating speech.

### C. Microaggressions and the Culture of Victimhood

The supposition of speech-based harm relies, in part, on the exaggerated consequences of what are called “microaggressions.” As defined by Derald W. Sue and his coauthors, “Racial microaggressions are brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults to the target person or group.”<sup>541</sup> Sue and his coauthors claim that “the cumulative effects [of microaggressions] can be quite devastating” with “a dramatic and detrimental impact on people of color.”<sup>542</sup> While this might sound like a problematic phenomenon, the charade is revealed by examples of the supposed “racial slights and insults.” Consider the following phrases, which are actual examples of supposed “microaggressions”:

- “America is a melting pot”;
- “There is only one race, the human race”;
- “I believe the most qualified person should get the job”;
- “Everyone can succeed in this society, if they work hard enough.”<sup>543</sup>

In addition to those remarks, several aspects of the social environment also constitute microaggressions. The following are verbatim examples taken from Sue and his coauthors:

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<sup>541</sup> Sue et al., *supra* note 366, at 273.

<sup>542</sup> *Id.* at 279.

<sup>543</sup> *Id.* at 276.

- “dismissing an individual who brings up race/culture in work/school setting”;
- “overcrowding of public schools in communities of color”;
- “overabundance of liquor stores in communities of color.”<sup>544</sup>

“Gender, sexual orientation, and disability microaggressions may have equally powerful and potentially detrimental effects on women, gay, lesbian, bisexual, and transgender individuals, and disability groups,” claim Sue and his coauthors.<sup>545</sup> For those who value freedom of speech and open inquiry, it should be of great concern that the left is exploiting these pseudoscientific “offenses” to amass more censorious power in official hands. The policing of microaggressions functions to empower official institutions to restrict or chill certain opinions.

Sociologists Bradley Campbell and Jason Manning, in a much-discussed recent paper, posited that left-wing students’ current fixation on microaggressions is caused by a profound underlying cultural shift towards a “culture of victimhood.”<sup>546</sup> Within the culture of victimhood, “individuals and groups display high sensitivity to slight, have a tendency to handle conflicts through complaints to third parties, and seek to cultivate an image of being victims who deserve assistance.”<sup>547</sup> As Campbell and Manning show, the culture of victimhood is now inculcated and entrenched to a degree with few historical parallels.<sup>548</sup> These problems have accumulated over the decades. In the 1980s and 1990s books such as *The Closing of the American Mind* and *The Disuniting of America*, among other sober analyses, presaged these developments within civil society.<sup>549</sup> Instead of fostering maturity, resilience, and open discourse, the contemporary left is clamoring to inculcate a self-righteous state of victimhood in nearly every conceivable identity group—or, in the case of whites, a guilt complex of Puritanical magnitude. Within a culture of

<sup>544</sup> *Id.*

<sup>545</sup> *Id.* at 284.

<sup>546</sup> Campbell & Manning, *supra* note 75, at 695.

<sup>547</sup> *Id.*

<sup>548</sup> *Id.* at 692.

<sup>549</sup> ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND 96 (1987) (insisting that ethnic studies programs cause “long-term deterioration of the relations between the races” and that “democratic society cannot accept any principle of achievement other than merit”); SCHLESINGER, JR., *supra* note 92, at 136 (arguing that the modern intellectual climate “encourage[s] minorities to see themselves as victims”).

victimhood, “victimization [is] a way of attracting sympathy, so rather than emphasize either their strength or inner worth, the aggrieved emphasize their oppression and social marginalization.”<sup>550</sup> Within a culture of victimhood, “[p]eople increasingly demand help from others, and advertise their oppression as evidence that they deserve respect and assistance.”<sup>551</sup> We should expect that the victim mentality will produce demands for “help from others” and requests for “assistance” in the form of speech regulation. But who are the “others” that will be providing this well-meaning “help” and “assistance”? Could it be family, friends, clergy, neighborhood associations, bowling leagues, or any other part of civil society? A healthy civil society does not appear to be the goal of the victimhood culture. Importantly, the practical goal of victimhood culture is to gain official recognition of victim status, and broaden the powers of official institutions, so that those institutions can be put to the service of grievance groups.

In the victimhood culture, aspiring victims “publicly air complaints *to compel official action*” according to Campbell and Manning.<sup>552</sup> Campbell and Manning observe that “the core of much modern activism . . . appears to be concerned with rallying enough public support *to convince authorities to act*.<sup>553</sup> In fact, “the availability of” social authorities who will entertain victimhood claims “is conducive to reliance on third parties,” such as the state.<sup>554</sup> Aspiring victims “seek to cultivate an image of being victims who deserve assistance.”<sup>555</sup> However, this political strategy carries tremendous social, cultural, and psychological liabilities. The primary risk is the chilling effect on free speech and the enforcement of leftist orthodoxy under the guise of protecting emotionally fragile individuals and groups. There is another risk, however, that is far more troubling. As Campbell and Manning describe, “Insofar as people come to depend on law alone, their willingness or ability to use other forms of conflict management may atrophy, leading to a condition” called “legal overdependency.”<sup>556</sup> When people fall into legal overdependency, they may cease using social or moral suasion in everyday conflicts and instead

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<sup>550</sup> Campbell & Manning, *supra* note 75, at 715.

<sup>551</sup> *Id.*

<sup>552</sup> *Id.* at 716 (emphasis added).

<sup>553</sup> *Id.* at 698 (emphasis added).

<sup>554</sup> *Id.*

<sup>555</sup> *Id.* at 695.

<sup>556</sup> *Id.* at 697 (internal quotes omitted).

turn to government officials.<sup>557</sup> Critically, “[t]he highest degrees of legal overdependency occur in totalitarian societies.”<sup>558</sup> The sociocultural process at work here deserves close attention. People may become overdependent on government authorities to resolve their conflicts and mediate their social interactions. When this happens, people can actually lose their developed or natural social skills because those skills “may atrophy” once people habitually turn to authorities to resolve their social disputes. As Campbell and Manning point out, this condition is especially pronounced “in totalitarian societies.”<sup>559</sup> If people continually resort to authorities with all of their grievances, this habit will eventually corrupt the individual and society, fostering totalitarian tendencies. Speech regulation then further encourages a culture of victimhood by institutionalizing victim status and incentivizing the advocacy of censorship as a means to political power. In sum, the culture of victimhood is potentially both a cause of speech regulation, and an effect of official institutions’ willingness to regulate speech. Milosz, describing the suffocating social pressures of Soviet indoctrination, wrote, “Forty or fifty years of education in these new [Soviet] ethical maxims must create a new and irretrievable species of mankind.”<sup>560</sup> The new dogmas of institutionalized political correctness have undeniably produced a new species of student activist. It remains to be seen whether current activists’ hypersensitive and censorious attitudes are irreversible characteristics of a widespread culture.

Lukianoff and Haidt warn, “[I]ncreased focus on microaggressions coupled with the endorsement of emotional reasoning is a formula for a constant state of outrage, even toward well-meaning speakers trying to engage in genuine discussion.”<sup>561</sup> Group grievances, a sense of victimhood, the hunt for “microaggressions,” and state power feed upon each other, culminating in calls to limit free speech. Today’s leftist activists are so persuaded of their own moral purity that they believe themselves justified in slashing away at perhaps the most cherished freedom in American society. Alexander Meiklejohn asserted, “To be afraid of any idea is to be unfit for self-government.”<sup>562</sup> If Meiklejohn’s assertion is valid, then there is a growing segment of American society

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<sup>557</sup> *Id.*

<sup>558</sup> *Id.*

<sup>559</sup> *Id.*

<sup>560</sup> MIOSZ, *supra* note 157, at 77.

<sup>561</sup> Lukianoff & Haidt *supra* note 96.

<sup>562</sup> MEIKLEJOHN, *supra* note 54, at 124.

whose response to opposing ideas does not auger well for the future. Microaggressions are essentially thought crimes, to be policed by proper authorities. Microaggressions provide a social-scientific veneer for the persecution of certain ideas that are inconsistent with the reigning leftist ideology in American universities.

#### *D. Sensitivity Training as Totalitarian Reeducation in the New Intellectual Milieu*

Left-wing student protesters regularly demand mandatory sensitivity training, other leftist doctrinal classes for the entire student body, or the addition of new faculty chosen on purely racial grounds.<sup>563</sup> In those demands, we hear echoes of the totalitarian apparatus of reeducation and doctrinal denunciation. In China, the Communist Party would convene denunciation sessions to ritually chastise opponents.<sup>564</sup> Cheng describes the ordeal of a colleague subjected to group criticism during the Cultural Revolution: “He admitted humbly all the ‘crimes’ listed by the speakers and accepted the verdict that his downfall was due to the fact that he did not have sufficient socialist awareness.”<sup>565</sup> Ryckmans observed that, in Chinese higher education following the Cultural Revolution, “the psychological climate is poisoned by fear.”<sup>566</sup> Similarly, modern sensitivity training obliges the individual to adopt a stance of ardent, enlightened passivity; passive acceptance of the dictates of political correctness. Brustein points to “the disgusting Orwellian technique known

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<sup>563</sup> See Isaac Stanley-Becker, *A Confrontation Over Race at Yale: Hundreds of Students Demand Answers from the School’s First Black Dean*, WASH. POST (Nov. 5, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/11/05/a-confrontation-over-race-at-yale-hundreds-of-students-demand-answers-from-the-schools-first-black-dean/> [https://perma.cc/TT4E-8TQV] (discussing “student demands for additional black faculty, racial sensitivity training for freshmen and the dismissal of administrators viewed as racially inattentive”); Elliott C. McLaughlin, *University of Missouri President and Chancellor Step Down Amid Race Row*, CNN (Nov. 9, 2015, 10:06 PM), <http://www.cnn.com/2015/11/09/us/missouri-football-players-protest-president-resigns/> [https://perma.cc/3R4Q-LNTT] (“[The University chancellor] ordered mandatory sensitivity training for faculty and students, but black students said the gestures were insufficient and called for school officials to implement broader cultural sensitivity training, increase minority staffing and take other steps.”).

<sup>564</sup> CHENG, *supra* note 71, at 18.

<sup>565</sup> *Id.* at 19.

<sup>566</sup> LEYS, *supra* note 113, at 155.

as ‘sensitivity training,’ where people are asked to confess to unconscious racism and brainwashed of any thought diverging from current ideological conformity.”<sup>567</sup>

As Milosz wrote of the Soviet regime, succumbing to social pressure eventually brings a sense of relief.<sup>568</sup> “To identify one’s self with the role one is obliged to play brings relief and permits a relaxation of one’s vigilance. Proper reflexes at the proper moment become truly axiomatic.”<sup>569</sup> In speaking about the insincere behavior required by Soviet norms, Milosz asserts that “[a]cting on a comparable scale has not occurred often in the history of the human race.”<sup>570</sup> For the communist regime, “[t]he aim is to anesthetize critical intelligence, purge the brain, and inject the cement of official ideology into the emptied skull.”<sup>571</sup> So writes Ryckmans of China’s official doctrinal teachings,<sup>572</sup> and the same description applies to diversity and sensitivity training, with their aura of expertise and intimidation.

Universities already offer ethnic studies, queer studies, feminist studies, Marxists studies,<sup>573</sup> and every imaginable opportunity for leftist identity groups to revel in self-pity and self-righteousness. Yet, the leftist protestors seek even more institutional control and—of course—sensitivity training. Campbell and Manning posit that the “growth in the size and scope of university administrations and in the salaries of top administrators” are social trends that encourage the culture of victimhood.<sup>574</sup> Here we have a feedback loop of universities enabling ideological extremists, which encourages irrational, exaggerated, or fabricated victim claims that translate into larger bureaucracies to accommodate the victim groups. This is precisely the sort of intellectual milieu that crushes creativity and sober reasoning.

The university now promulgates the modern equivalent of the progressive party line under communist dictatorships, described by Serge:

<sup>567</sup> Brustein, *supra* note 472, at 30.

<sup>568</sup> MIOSZ, *supra* note 157, at 55.

<sup>569</sup> *Id.*

<sup>570</sup> *Id.* at 57.

<sup>571</sup> LEYS, *supra* note 113, at 167.

<sup>572</sup> *Id.*

<sup>573</sup> See, e.g., *Courses*, DENISON U., <https://denison.edu/courses> [<https://perma.cc/SSV5-CQ5D>]; *General-Education Courses*, U. OF OR., <http://uocatalog.uoregon.edu/genedcourses> [<https://perma.cc/37EG-DJEQ>].

<sup>574</sup> Campbell & Manning, *supra* note 75, at 710.

The Party is the repository of truth, and any form of thinking which differs from it is a dangerous or reactionary error. Here lies the spiritual source of its intolerance. The absolute conviction of its lofty mission assures it of a moral energy quite astonishing in its intensity—and, at the same time, a clerical mentality which is quick to become Inquisitorial.<sup>575</sup>

Progressive educators today openly announce their zeal to enforce the new party line.<sup>576</sup> A past president of the American Sociological Association, Dr. Joe Feagin, wrote that “[r]e-education will need to be a routine part of the mass media and to operate within American families, especially white families.”<sup>577</sup> On American campuses, the movement to suppress speech “is creating a culture in which everyone must think twice before speaking up, lest they face charges of insensitivity, aggression, or worse.”<sup>578</sup> The demands made by leftist activists amount to a declaration of tribalism and intensified partisanship.

Under the Maoist system, the “class struggle” served as “the regime’s safety valve, its basic hygiene, a periodic bloodletting that allows it to eliminate the toxins in its organism.”<sup>579</sup> The function of the “class struggle” today is performed by the struggle against racism, sexism, and classism. Critical race theory merges racial victimhood with crude class-based grievances, and feminist theory does the same with gender victimhood. Contemporary leftist doctrine claims a more diverse collection of “oppressed groups” than totalitarian communism, but the underlying dogma remains. Intellectual discourse in higher education has come to resemble a charade, where schools proclaim a commitment to open dialogue and diverse perspectives while promulgating rigid leftist doctrine and demonizing dissent. Aside from teachings on racism, sexism, and classism, what else should leftist professors realistically be expected to impart to their students? To be critical of leftist ideology? It would be illogical for ideologues to encourage criticism of their own ideology. Ideologues should be expected to demand that institutions promulgate their views and exclude or demonize alternative voices. Persecution is, as

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<sup>575</sup> SERGE, *supra* note 17, at 134.

<sup>576</sup> See Lukianoff & Haidt, *supra* note 96.

<sup>577</sup> Jacqueline Johnson, Sharon Rush & Joe Feagin, *Reducing Inequalities, Doing Anti-Racism: Toward an Egalitarian American Society*, 29 CONTEMP. SOC. 95, 104 (2000).

<sup>578</sup> Lukianoff & Haidt, *supra* note 96.

<sup>579</sup> LEYS, *supra* note 113, at 191.

Justice Holmes noted, perfectly logical.<sup>580</sup> Hence the demands for sensitivity training, which are almost invariably *fora* for some variety of politically correct dogma.

As one Yale student aptly put it when demanding that a Yale staff member “step down” for defending the principle of free speech, “It is not about creating an intellectual space!”<sup>581</sup> Sadly, the use of “sensitivity” rhetoric to crush social inquiry and debate appears to be a growing feature of public discourse, although the censorious climate is certainly not new.<sup>582</sup> President George H.W. Bush complained in 1991 that “free speech” was “under assault throughout the United States, including on some college campuses.”<sup>583</sup> What has changed is the willingness to criminalize speech and the intolerant refusal of many leftists to consider or even tolerate opposing views.<sup>584</sup> Lukianoff and Haidt write, “[T]he ideas, values, and speech of the other side are seen not just as wrong but as willfully

<sup>580</sup> Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>581</sup> Robby Soave, *Watch Students Tell Yale to Fire a Staffer who Upset Their Safe Space: Yale Just Became Ground Zero in the Campus Free Speech Wars*, REASON (Nov. 6, 2015, 3:30 PM), <https://reason.com/blog/2015/11/06/watch-students-tell-yale-to-fire-a-staff> [https://perma.cc/US4K-S677].

<sup>582</sup> CHARLES J. SYKES, A NATION OF VICTIMS: THE DECAY OF THE AMERICAN CHARACTER 164 (George Witte ed., 1992) (“Once feelings are established as the barometer of acceptable behavior, speech (and, by extension, thought) becomes only as free as the most sensitive group [on campus] will permit.”).

<sup>583</sup> Gerhard Peters & John T. Woolley, *President George Bush: “Remarks at the University of Michigan Commencement Ceremony in Ann Arbor”*, AM. PRESIDENCY PROJECT (May 4, 1991), <http://www.presidency.ucsb.edu/ws/?pid=19546> [https://perma.cc/7MP5-JFM6].

<sup>584</sup> See, e.g., Lukianoff & Haidt, *supra* note 96; Morey, *The Coddling of the American Mind*, ATLANTIC MONTHLY, Sept. 2015, at 42; Morey, *supra* note 489 (“I don’t agree that you, when you become students at colleges, have to be coddled and protected from different points of view.”) (quoting Barack Obama, U.S. Dept. of Educ. Sec. Arne Duncan’s 2015 back-to-school bus tour at Des Moines North High School (Sept. 14, 2015)); *President Obama: Student Protests Should Embrace Free Speech*, FIRE (Nov. 16, 2015), <https://www.thefire.org/president-obama-student-protests-should-embrace-free-speech/> [https://perma.cc/J4R7-CADD] (“And so when I hear, for example, folks on college campuses saying, ‘We’re not going to allow somebody to speak on our campus because we disagree with their ideas or we feel threatened by their ideas,’ I think that’s a recipe for dogmatism and I think you’re not going to be as effective.”) (quoting Barack Obama, Interview with George Stephanopoulos, ABC News (Nov. 15, 2015)).

aggressive toward innocent victims.<sup>585</sup> In the unreasoning screams and unctuous demands of campus protesters, we hear echoes of totalitarianism. Russian revolutionary Victor Serge wrote, “I have met my assailants face-to-face in public meetings, offering to answer any question they raised. Instead, they always strove to drown my voice in storms of insults, delivered at the tops of their voices.”<sup>586</sup> Serge made the same mistake that many commencement speakers, invited guests, and ordinary students make today: he assumed that the doctrinaire leftists generally desire open dialogue.

Following the 1960s Long March, the revolutionaries neglected to replace what they undermined within our culture, and the resulting intellectual milieu is intolerant, uncreative, and ultimately unproductive. Ryckmans would write of the Maoist youth leadership during the Cultural Revolution, “[W]e have come to the paradoxical point where young members of the new ruling elite have less culture than many illiterates or semiliterates under the old regime.”<sup>587</sup> The final result of the Cultural Revolution was “to have thinned out the actual content of what is learned by deleting most of the history, language, and literature that are the foundations of culture.”<sup>588</sup> What Ryckmans witnessed of the Maoist youth leadership applies to campus discourse today. The modern academy suffers from a malaise recognizable by those familiar with the history of communist regimes. Orthodoxy today is not imposed by revolutionary violence, but orthodoxy has hardened to the point that opposing viewpoints are treated with a defensive, bullying, and—at times—aggressive response.<sup>589</sup> Marcus observed, “[T]he general intellectual tone has become

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<sup>585</sup> Lukianoff & Haidt, *supra* note 96.

<sup>586</sup> SERGE, *supra* note 17, at 338.

<sup>587</sup> LEYS, *supra* note 113, at 141.

<sup>588</sup> *Id.* at 149.

<sup>589</sup> When a photographer for a student newspaper at the University of Missouri attempted to cover on-campus demonstrations, communications professor Melissa Click yelled out: “Help me get this reporter out of here. I need some muscle over here.” Jonathan Chait, *Can We Start Taking Political Correctness Seriously Now?*, N.Y. MAG. (Nov. 10, 2015, 9:01 AM), <http://nymag.com/daily/intelligencer/2015/11/can-we-take-political-correctness-seriously-now.html> [https://perma.cc/LEL4-F76L].

After the Wesleyan University student newspaper published an opinion piece critical of Black Lives Matter activists, students reportedly stole and destroyed the newspaper around campus, then the student newspaper made a front-page apology for publishing the article, promising to make the paper “a safe space for the student of color community.” The

(continued)

worse than ever, while standards and judgments of quality, in the humanities and the social sciences, have continued to go more or less out the window.”<sup>590</sup> Likewise, philosopher John Searle writes, “[A]s far as general intellectual level is concerned, the field of ‘literary theory’ is probably the lowest I have experienced.”<sup>591</sup> The constant “unmasking” in Soviet systems finds an echo in today’s “critical theory,” which locates or invents racism and sexism in every imaginable manifestation of politics, art, and literature. Renowned education expert Diane Ravitch suggests that the left-wing university “reforms of the 1960s produced a sharp decline in academic achievement and in academic standards.”<sup>592</sup> It cannot be a coincidence that this devolution of culture and intellectual achievement coincided with the 1960s Long March. Ultimately, under communist regimes, people were forced to speak an unnatural, different language whenever conversation broached a topic touching on official orthodoxy.<sup>593</sup> “Broadly speaking one may say that in China people have now at their disposal two levels of languages: one, human and natural, which allows them to speak in their own voice . . . and another one, mechanical and shrill, to talk about politics.”<sup>594</sup> Ryckmans’ description of this perversion of language bears uncanny resemblance to the stultified public discourse so common today.

#### *E. The Role of the Social Sciences in Politically Correct Doctrinal Enforcement*

Historically, the social sciences under communist regimes were firmly devoted to communist dogma. “[I]ntellectual freedom in the humanities and social sciences” withered under communist regimes.<sup>595</sup> In the Soviet

student government then unanimously voted to cut funding for the newspaper in half. Catherine Rampell, *Free Speech Is Flunking Out on College Campuses*, WASH. POST (Oct. 22, 2015), [https://www.washingtonpost.com/opinions/free-speech-is-flunking-out-on-college-campuses/2015/10/22/124e7cd2-78f5-11e5-b9c1-f03c48c96ac2\\_story.html](https://www.washingtonpost.com/opinions/free-speech-is-flunking-out-on-college-campuses/2015/10/22/124e7cd2-78f5-11e5-b9c1-f03c48c96ac2_story.html) [https://perma.cc/MJ6D-SASB].

<sup>590</sup> Marcus, *supra* note 473, at 161.

<sup>591</sup> Searle, *supra* note 282, at 241.

<sup>592</sup> Diane Ravitch, *The War on Standards*, in OUR COUNTRY, OUR CULTURE: THE POLITICS OF POLITICAL CORRECTNESS, *supra* note 1, at 210, 212.

<sup>593</sup> LEYS, *supra* note 113, at 168.

<sup>594</sup> *Id.*

<sup>595</sup> BROWN, *supra* note 127, at 310, 314, 448 (noting decline “of intellectual freedom in the humanities and social sciences” under Chinese communism).

regime, “[t]he more ideological a profession, the greater the incidence of party membership. Thus, in research institutes, social scientists and academic lawyers would, overwhelmingly, be members of the Communist Party.”<sup>596</sup> For intellectuals under Soviet rule, “[o]ne compromise leads to a second and a third until at last, though everything one says may be perfectly logical, it no longer has anything in common with the flesh and blood of living people.”<sup>597</sup> Ideological influence distorted reasoning and undermined scholarly integrity, ultimately justifying the very regime that promoted the ideology.<sup>598</sup>

Today, ideologically biased social science serves as the basis for speech regulation.<sup>599</sup> Biased social science directly influences the empirical assumptions implicated in the contemporary hate speech debate, especially the extent of racism and sexism in American life. Predictably, ideologically biased academics will exaggerate the degree of racism and sexism in American life. Zuriff concludes, “This paradox of a constant appeal to racism in the context of a precipitous decline in racism is in part a consequence of a dilution of the meaning of racism for which social scientists are largely responsible.”<sup>600</sup> Therefore, ideological bias fundamentally threatens the First Amendment when hate speech regulation is premised on flawed research into speech-based harm.

Economist Glenn Loury once wrote, “The very way in which knowledge of the world around us is constituted has become dependent upon the strategic expression of ideologically motivated researchers.”<sup>601</sup> What Loury described is nothing short of an intellectual and cultural crisis. Haidt persuasively asserts the importance of “intellectual and ideological diversity” in institutions such as universities.<sup>602</sup> Tragically, American universities are manifestly at odds with the ideal of intellectual and ideological diversity, as academics are overwhelmingly liberal.<sup>603</sup> One illustrative data set of history faculty at the University of Texas and Texas

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<sup>596</sup> *Id.* at 132.

<sup>597</sup> MILOSZ, *supra* note 157, at 110.

<sup>598</sup> *Id.* at 201–02.

<sup>599</sup> See, e.g., Bennett, *supra* note 449, at 445.

<sup>600</sup> Zuriff, *supra* note 117, at 115.

<sup>601</sup> Glenn C. Loury, *Self-censorship, in OUR COUNTRY, OUR CULTURE: THE POLITICS OF POLITICAL CORRECTNESS*, *supra* note 1, at 132, 142.

<sup>602</sup> JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 90 (Pantheon Books 2012).

<sup>603</sup> See, e.g., Tierney, *supra* note 445.

A&M found that, of those history faculty who received their Ph.Ds in the 1990s, 83% and 93% respectively had race, class or gender research interests.<sup>604</sup>

To fully appreciate the depths of ideological dogma in the social sciences, one must recognize the purported teaching objectives of leading education researchers. The book *Schooling in Capitalist America* by Samuel Bowles and Herbert Gintis “inspired many graduate students in the 1970s, whose subsequent work significantly influenced theory and research in education,” and remains “an enduring influence for much subsequent theory and research in the sociology of education,” according to sociologist David Swartz.<sup>605</sup> As Swartz notes, Bowles and Gintis expounded the “Marxist approach to the sociology of education.”<sup>606</sup> In their influential 1976 book, Bowles and Gintis declared, “[W]e support the development of a revolutionary socialist movement in the United States.”<sup>607</sup> Out of that worldview, contemporary demands for speech restriction emerge quite naturally.<sup>608</sup>

There are a small number of exceptional universities, like the University of Chicago, standing for free speech:

[I]t is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply

<sup>604</sup> NAT’L ASS’N OF SCHOLARS, *supra* note 274, at 6–10.

<sup>605</sup> David L. Swartz, *From Correspondence to Contradiction and Change: Schooling in Capitalist America Revisited*, 18 SOC. F. 167, 167–68 (2003).

<sup>606</sup> *Id.*

<sup>607</sup> SAMUEL BOWLES & HERBERT GINTIS, SCHOOLING IN CAPITALIST AMERICA: EDUCATIONAL REFORM AND THE CONTRADICTIONS OF ECONOMIC LIFE 282 (1976).

<sup>608</sup> Bowles and Gintis, writing in 2002, looked back on their revolutionary 1976 position: “We took it as obvious [in 1976] that a system of democratic, employee-owned enterprises, coordinated by both markets and governmental policies” was the best system. Samuel Bowles & Herbert Gintis, *Schooling in Capitalist America Revisited*, 75 SOC. OF EDUC. 1, 15 (2002).

Bowles and Gintis continued, “We remain convinced of the attractiveness of such a system, but are less sanguine about its feasibility and more convinced that reforms of capitalism may be the most likely way to pursue the objectives that we embraced at the outset.” *Id.* at 15. Swartz summarizes that Bowles and Gintis were initially “Marxists,” who later altered their strictly Marxist perspective, and are now “stressing the dynamics of race and gender as well as class in stratification processes and structures.” Swartz, *supra* note 605, at 170, 177.

offensive. . . . [C]oncerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.<sup>609</sup>

Despite the occasional exception, the response of mainstream liberals within the academy appears to be guarded support for censorious radicalism, which is tantamount to endorsement.

Experience sadly proves that social science research is regularly influenced by bias, with unfortunate consequences for public policy and intellectual life.<sup>610</sup> Glenn Loury remarked, “[T]here are countless critical arguments, dissents from received truth, unpleasant factual reports, or nonconformist deviations of thought which go unexpressed.”<sup>611</sup> Self-censorship, as it was under communist regimes, remains a corrosive consequence of leftist hegemony. For their role in doctrinal enforcement, the social sciences are overdue for criticism.

## VII. CONCLUSION

This Article calls for reconsideration of the sociological, political, historical, and normative facets of hate speech regulation. Marxist-influenced critical theorists predominantly shape contemporary leftist thought. Therefore, the hegemonic conceptual framework within academia is ideologically descended from the same source as totalitarian communism. Hate speech regulation is certainly ideologically closer to the totalitarian tradition than to any prominent American constitutional tradition. Because of its intellectual origins, hate speech regulation will entail certain consequences for a free society. Today, as under the communist regimes, the pressure of a biased educational system and official indoctrination ensure that a substantial part of the public is affected by self-censorship. Today, an officially promoted victimhood culture ensconced in segments of society, and aggressively fostered within the academy, produces calls for overt censorship. Calls for hate speech regulation have grown more prominent over the past several decades<sup>612</sup>

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<sup>609</sup> UNIV. OF CHI., *Report of the Committee on Freedom of Expression* (July 2015), <http://provost.uchicago.edu/FOECommitteeReport.pdf> [<https://perma.cc/CXG7-GPQ8>].

<sup>610</sup> See, e.g., Cohen, *supra* note 445.

<sup>611</sup> Loury, *supra* note 601, at 135.

<sup>612</sup> See, e.g., Dem Congressman to Propose Crackdown on Campus ‘Hate Speech’, CONGRESSMAN ANTHONY BROWN (Sept. 6, 2017), <https://anthonybrown.house.gov/media/> (*continued*)

because of intensifying group resentments and leftist hegemony in academia. Within segments of society, a combination of factors feed off of each other: escalating group grievances; a sense of victimhood; and the will to impose doctrine, to persecute opposing viewpoints, and to empower a censorious government. This distinct combination of factors is characteristic of communist regimes,<sup>613</sup> and today's politically correct censorship descends from Marxist thought. Proposals to regulate hate speech escape robust empirical criticism because biased academics adhere to the doctrines underlying speech restriction. The institutional reality and consequences of communism, including censorship and indoctrination, are not critically explored. The result is that hate speech regulation has not faced the scrutiny it deserves.

Reflecting on the grim historical roots of contemporary speech regulation will provide civil society with an intellectual tool to understand the nature and aims of speech regulation. To explore the ideological origins of speech regulation is to appreciate where such overtly totalitarian measures could likely lead. This Article demonstrated that hate speech regulation cannot claim any cultural roots or philosophical background in the American tradition of free speech. Instead, egalitarian speech regulation was an essential feature of certain totalitarian regimes.<sup>614</sup> The ideological origins of hate speech regulation are of profound concern not simply because those origins allow for an interesting historical comparison, but because hate speech regulation emerges directly from factors characteristic of the totalitarian communist ideology. A set of unexamined premises and destructive consequences are inherent to hate speech regulation. The ideological origins of speech regulation become relevant when we seek to forecast the legal, political, ideological, and cultural ramifications of speech regulation. Hate speech regulation restructures society using several of the same conceptual and institutional foundations used by communist regimes, particularly the widespread institutionalization of official speech regulation and indoctrination. Also, proposals for speech regulation are an illuminating expression of a particular worldview, demonstrating distinct values and political interests as well as an insight into leftist conceptions of freedom and rights.

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in-the-news/dem-congressman-propose-crackdown-campus-hate-speech  
[<https://perma.cc/2KXS-42RA>].

<sup>613</sup> See *supra* Part III.

<sup>614</sup> See *supra* Part III.

Based on the foregoing, three prognoses present themselves. First, unless the university recommits itself to open discourse among diverse ideological perspectives, it is difficult to imagine a social setting in which rational thought will counterbalance the reigning dogma. Ryckmans, during a visit to communist China, wrote, “It is unfair to criticize Maoist bureaucrats for their slowness and inertia: most often nonaction is their best chance of survival.”<sup>615</sup> Chinese bureaucrats towed the party line, but they did so, in many cases, just to stay alive.<sup>616</sup> There is no such excuse for intellectual inaction in our free society today. Second, the American norms of free speech and open dialogue are under attack. We are witnessing the entrenchment of leftist intolerance on college campuses, with totalitarian echoes. Identity groups increasingly cultivate an incendiary sense of resentment, including the supposed right to restrict the opinions of others. Hate speech regulation combines a troubling orthodoxy with one of the most sinister forms of government control that modern man has been unfortunate enough to suffer under. Finally, hate speech regulation will inevitably devolve into the criminalization of ideological opposition. This criminalization will occur through manipulative and empirically flawed accusations of speech-based harm, in the form of “microaggressions” or other disapproved expressions. The function of hate speech regulation is to enforce doctrine through an antidemocratic, totalitarian measure.

American society is disunited by tribalism, weakened by the culture of victimhood, and intellectually scoured by political correctness. As this Article strove to demonstrate, the most fitting historical parallel for today’s resentment-driven speech regulation is the censorship practiced by twentieth-century communist regimes. Destructive chilling effects have already transformed the entire character of public debate. It is a crisis that so many scholars and student activists are calling for speech regulation, and a scandal that doctrinal conformists in the university treat these proposals with fealty. No one familiar with existing patterns of political activism, faculty partisanship, and intellectual rigidity can claim surprise at the current state of intellectual discourse within many of America’s colleges.

Beyond the immediate threat of censorship, many questions remain. Why do Marxist-influenced ideas have such power in universities, despite the breathtaking human toll of Marxist regimes? Are academics able to

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<sup>615</sup> LEYS, *supra* note 113, at 119.

<sup>616</sup> *Id.*

promulgate their doctrines while still welcoming, teaching, and adequately exploring a range of perspectives? Is the university accomplishing its mission when roughly one-half of the American political spectrum is silenced and condemned on college campuses? What will university administrators do to safeguard open dialogue? Why are there so few independents or conservatives entering the humanities and social sciences? Are conservatives simply opting out while liberals disproportionately self-select? Given the role of the social sciences in downplaying or ignoring the injustices of twentieth-century communist regimes, aren't the social sciences due for self-reflection? As for the activists, what is the cultural or psychological hinge that turns a partisan activist into a totalitarian?

If present trends continue, the individual will be pressured to conform to an increasingly rigid doctrine. Independent, moderate, and conservative students will become pariahs. It appears that the only assertive authority figures in the university are either liberal or leftist. Hence, leftist students will likely be encouraged in their every aggrieved whim. Professors will have no incentive to include opposing perspectives or encourage dissenting voices in the classroom. Political disagreement with the hegemonic doctrine will be treated as pathology. Generations of students may never have their core beliefs challenged but will instead grow accustomed to turning to authorities every time they feel offended. The intellectual suffocation will continue until research into our pressing social issues is completely corrupted by dogma, our shared understanding of society impoverished. Today's calls for speech regulation have an ominous historical parallel. The censorious instinct is a constant threat to free society, and the state remains the most coveted tool for imposing the censorious instinct. Hate speech regulation would elevate group grievances into an aggressively enforced official dogma, reinforced by the predictable chilling effect of official censure. Upon consideration, hate speech regulation has totalitarian ideological origins. If they are further encouraged along their present course, we should expect today's censors to eventually exhibit other characteristic attributes of those ideological origins.

